LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
APR 1 1958
JOHN T. FEY, Clerk

No. 884

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

RAY M. BENJAMIN, ET AL.,
Petitioners,

vs.

THE CITY OF COLUMBUS, ET AL.,
Respondents.

G. D. FERGUSON, ET AL.,
Petitioners,

vs.

THE CITY OF COLUMBUS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

WAYMON BELTON MCLESKEY,
OWEN B. SHERWOOD,
Attorneys for Petitioners.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

INDEX

Citations to opinions below 2
Jurisdiction 2
Questions presented 3
Constitutions, statutes and ordinances involved 5
Statement of the cases 6
How federal questions are presented 8
Reasons for granting the writ 9
Conclusion 20
Appendix A—Opinion of the Court of Appeals, dated November 30, 1954 21
Appendix B—Decision of the Common Pleas Court... 38
Appendix C—Opinion of the Court of Appeals, dated February 7, 1957 52
Appendix D—Opinion of the Supreme Court of Ohio.. 62
Appendix E—Judgment entries of the Supreme Court of Ohio 82
Appendix F—Ordinance No. 156-53 84
Appendix G—Ordinance No. 157-53 87
Appendix H—Ordinance No. 1615-54 91

Authorities Cited

Allgeyer v. Louisiana, 165 U. S., 578..... 12
Benjamin v. City of Columbus, 73 Ohio Law Abstract, 143 12
Brafford v. Calhoun, 72 Ohio App., 333..... 12
Burstyn v. Wilson, 343 U. S., 495..... 18
Carolene Products Company v. Thompson, 276 Mich., 172 12

Carolene Products Company v. Banning, 131 Neb., 429. 12
Collins v. Kentucky, 234 U. S., 634 18
Commonwealth v. Handmore, 60 Dauphin County Reports, 416 9
Commonwealth v. Mihalow, 142 Super. Ct., 433 9
Connolly v. General Construction Co., 269 U. S., 385 ... 18
Crane v. Hahlo, 258 U. S., 142 18
Couch v. State, 71 Okla. Cr., 223 9

Dallman v. Kluchesky, 229 Wisc., 169 12
Deeb v. Stoutamire, 53 So. (2d), 873 9
Dobbins v. Los Angeles, 195 U. S., 223 16

Erwin Billiard Parlor v. Buckner, 156 Tenn., 278 12

Ferguson v. City of Columbus, 70 Ohio Law Abstract, 277 .....15, 17
Frecker v. City of Dayton, 88 Ohio App., 52 14
Frecker v. City of Dayton, 153 Ohio State, 14 14

Hagerman v. City of St. Louis, 283 S. W. (2d), 623 12
Hartford Steam Boiler Inspection and Insurance Company v. Harrison, 301 U. S., 459 16
Hightower v. State, 156 S. W. (2d), 327 9

In re: Lawrence, 55 Calif. App. (2d), 491 13
In re: Petition of Chief County Detective, 54 Dauphin County Reports, 16 9

Johnson v. Phinney, 218 Fed. (2d), 303 10

Lanzetta v. New Jersey, 306 U. S., 451 18
Loof v. City of Long Beach, 314 Pac. (2d), 518 16

McCloskey v. Tobin, Sheriff, 252 U. S., 107 15
Meyer v. State of Nebraska, 262 U. S., 390 12
Murphy v. California, 225 U. S., 623 .....13, 14, 15, 19

Nebbia v. New York, 291 U. S., 502 19

Ohio Bell Telephone Company v. Public Utilities Commission of Ohio, 301 U. S., 292 19

Panama Refining Company v. Ryan, 293 U. S., 388..... 17
People v. One Pin Ball Machine, 316 Ill. App., 161.... 9
People v. One Slot Machine, 303 Ill. App., 337..... 9
Powell v. Pennsylvania, 127 U. S., 678..... 11

Riley v. Sweat, 110 Fla., 362..... 12
Robique v. Lambert, 114 Fed. Sup., 305..... 10

Schechter v. United States, 295 U. S., 495..... 17
Sharpe v. Johnson, 81 Calif. App. (2d), 939..... 13
Sports Daily v. Public Service Commission, 179 Md., 355 12
State v. Betti, 23 N. J. Misc., 169..... 9
Sterling Distributors Inc. v. Director of Public Safety, 135 N. J. Eq., 508..... 9

Tooley v. United States, 134 Fed. Sup., 162..... 10

United States v. Cardiff, 344 U. S., 174..... 18
United States v. Korpan, 354 U. S., 271..... 10
United States v. Two (2) "Exhibit Rotary" Coin Operated Gambling Devices, 107 Fed. Sup., 314..... 10
Urban's Appeal, 148 Super. Ct., 101..... 9

Wells v. City of Norwood, 64 Ohio Law Abstract, 53.. 12
Wigton's Return, 151 Super. Ct., 337..... 9

Yick Wo v. Hopkins, 118 U. S., 356.....10, 16, 17

Constitution

Article XVIII, Sec. 3, Ohio Constitution 5, 14

Statutes

26 U. S. C., Sec. 4662 (a) (1) 10
26 U. S. C., Sec. 4662 (a) (2) 11
28 U. S. C., Sec. 1257 (3) 2
Ohio Revised Code Sec. 715.51.....5, 14

Ordinances

No. 156-53, City of Columbus, Ohio.....5, 15, 17
No. 157-53, City of Columbus, Ohio.....5, 15, 17
No. 1615-54, City of Columbus, Ohio..... 5

Texts

10 Ohio Juris. (2d), 506, Sections 428-429..... 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

RAY M. BENJAMIN, ET AL.,
Petitioners,

vs.

THE CITY OF COLUMBUS, ET AL.,
Respondents.

G. D. FERGUSON, ET AL.,
Petitioners,

vs.

THE CITY OF COLUMBUS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners pray that a writ of certiorari issue to review the judgments of the Supreme Court of Ohio, entered in the above entitled causes on the eighteenth day of December, 1957.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of the Second District, reversing a judgment on the pleadings in the Ferguson case is printed in Appendix A hereto, infra, pp. 21-38, and is reported in 70 Ohio Law Abstract, 277 (unofficial). The opinion of the trial court on the merits in both the Ferguson and Benjamin cases, which were heard together, is printed in Appendix B hereto, infra, pp. 38-52, and is reported in 73 Ohio Law Abstract, 143 (unofficial). The opinion of the Court of Appeals of the Sixth District on the merits in both cases, is printed in Appendix C hereto, infra, pp. 52-62, and is as yet unreported. The opinion of the Supreme Court of Ohio, one judge concurring in the judgment only and one judge dissenting, is printed in Appendix D hereto, infra, pp. 62-82; R. 255-276, and is reported in 167 Ohio State, 103.

JURISDICTION

The judgments of the Supreme Court of Ohio were entered on the eighteenth day of December, 1957, and are printed in Appendix E hereto, infra, pp. 82-83; R. 234-235; 246. Timely applications for re-hearings were filed on the thirty-first day of December, 1957 (R. 238-243; 250-255); and were denied on the fifteenth day of January, 1958 (R. 235, 246). The jurisdiction of this court is invoked under 28 U. S. C., Section 1257 (3), since the validity of three ordinances enacted by the council of the city of Columbus, Ohio, on grounds of repugnancy to the Constitution of the United States, is drawn in question.

QUESTIONS PRESENTED

1. Whether in enacting Ordinance No. 1615-54, prohibiting the possession, custody or control of pin games at any place within the city of Columbus, Ohio, whether public or private and regardless of whether said games be operated for purposes of amusement or otherwise, the council of said city took property of the petitioners without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, when pin games owned by them are, admittedly, being operated within said city for amusement purposes only.

2. Whether in enacting Section 2 of Ordinance No. 156-53, prohibiting the exhibition of any game which tends to encourage gambling, and Section 1 of Ordinance No. 157-53 prohibiting the exhibition of any game (1) which tends to encourage gambling, (2) which registers odds or a score, or (3) which may readily be converted into a gambling device, the council of the city of Columbus, Ohio, denied the equal protection of the law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, to petitioners who are admitted to be exhibitors of pin games for amusement purposes only, when said city has announced its intention of enforcing said ordinances against said pin games and of ignoring all other games which come within the provisions of said ordinances.

3. Whether the phrases "which in no way tends to encourage gambling," contained in Section 1 of Ordinance No. 156-53; "which tends to encourage gambling," contained in Section 2 of said ordinance; "which tends in any way to encourage gambling," contained in Section 3 of said ordinance; "which tends to encourage gambling * * *" or which is adapted or may readily be converted into such

gambling device, or instrument," contained in Section 1 of Ordinance No. 157-53; and "any device easily convertible to automatic payoff or free play by slight changes in, or addition to the mechanical structure," contained in Section 4 of said Ordinance No. 157-53—all as enacted by the council of the city of Columbus, Ohio—are so vague, indefinite and uncertain as to constitute a denial of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

4. Whether in the enactment of Section 3 of Ordinance No. 156-53 which provides that the city auditor of Columbus, Ohio may not issue a license or registration for any machine, device or instrument which tends to encourage gambling, and in the enactment of Section 1 of Ordinance No. 157-53 which provides that every game (1) which tends to encourage gambling or (2) which registers odds or a score, or (3) which may readily be converted into a gambling device, shall be subject to seizure by any police officer of said city, the council of the city of Columbus, Ohio attempted to confer judicial power on both said auditor and police officer and thereby deprived petitioners of due process of law as well as of the equal protection of the law within the meaning of the Fourteenth Amendment to the Constittuion of the United States.

5. Whether the enactment of Ordinances Nos. 156-53, 157-53, and 1615-54 by the council of the city of Columbus, Ohio, impaired the obligation of contracts which petitioners then and now hold with merchants in said city for the operation of pin games for amusement purposes only within the meaning of Article I, Section 10 of the Constitution of the United States.

6. Whether Ordinances Nos. 156-53, 157-53, and 1615-54 as enacted by the council of the city of Columbus, Ohio are so unreasonable, arbitrary and capricious as to constitute

an unreasonable exercise of the police power and, therefore, a denial of due process of law to petitioners within the meaning of the Fourteenth Amendment to the Constitution of the United States.

7. Whether the refusal of the Supreme Court of Ohio to consider the evidence offered by the petitioners in the trial court, tending to show that the games operated by the petitioners do not have evil potentialities (R. 270-271) amounted to a denial to petitioners of due process of law as well as of the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONS, STATUTES AND ORDINANCES INVOLVED

The constitutional provision involved is Article XVIII, Section 3 of the Ohio Constitution (Appendix, Page's Ohio Revised Code Annotated, p. 587), which reads:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The statute involved is Section 715.51 of the Revised Code of Ohio (Title 7, Page's Ohio Revised Code Annotated, p. 162), which reads:

> "Any municipal corporation may:
> (A) Regulate billiard and pool tables, nine or ten pin alleys or tables, and shooting and ball alleys;
> (B) Authorize the destruction of instruments or devices used for the purpose of gambling."

The ordinances involved are Nos. 156-53 and 157-53 (Volume 38, Columbus City Bulletin, p. 128), and No. 1615-54 (Volume 39, Columbus City Bulletin, p. 983),

enacted by the council of the city of Columbus, Ohio, and are printed in Appendices F, G and H hereto, infra, pp. 84-92.

STATEMENT OF THE CASES

On the tenth day of March, 1953, Ordinances Nos. 156-53 and 157-53 were enacted by the council of the city of Columbus, Ohio, and became effective on the tenth day of April, 1953. Section 2 of Ordinance No. 156-53 prohibits, among other things, the exhibition of any game which tends to encourage gambling. Section 1 of Ordinance No. 157-53 prohibits, among other things, the exhibition of any games (1) which tend to encourage gambling, (2) which registers odds or a score, or (3) which may readily be converted into a gambling device. Section 3 of Ordinance No. 156-53 authorizes the city auditor to deny a license for any machine which tends to encourage gambling. Section 1 of Ordinance No. 157-53 authorizes any police officer to seize any such machine so exhibited.

On the twenty-sixth day of March, 1953, the petitioners filed their petition in the Ferguson case in which they sought a declaratory judgment and injunction. They alleged, among other things, that they were engaged in the business of owning and operating amusement games in said city; that they owned and operated approximately 540 games having a total value of approximately $200,000.00, and that they had been in the business from 5 to 17 years. (R. 22) After describing the manner in which the games are operated, the petition alleges that:

> "* * * each player receives identically the same number of marbles or balls or pucks from said machine for each 5¢ inserted therein; that he endeavors to make as high a score as possible; that no merchandise, checks, tokens or any other objects whatsoever are

released by said game; that said game does not give any return or free-play or plays; that upon playing said game the player receives in return for his money amusement only;" (R. 23)

On the fifteenth day of February, 1954, respondents filed a motion for judgment on the pleadings, which motion was, on the nineteenth day of July, 1954, sustained, and the action dismissed. An appeal on questions of law was thereupon perfected to the Court of Appeals of the Second District, which court, on the thirtieth day of November, 1954, reversed that judgment on the grounds, among others, that (1) issues of fact were involved and the judgment was accordingly prematurely entered, and (2) the authority given to (a) the city auditor to deny a license and (b) a police officer to seize such games, was an unlawful delegation of judicial power. (Appendix A hereto, infra, pp. 21-38)

On the seventh day of December, 1954, the city council of Columbus, Ohio, passed Ordinance No. 1615-54, effective immediately, which ordinance prohibits the possession, custody or control of these games. On the eighth day of March, 1955, petitioners filed their petition in the Benjamin case in which they also sought a declaratory judgment and injunction.

The Ferguson and Benjamin cases were consolidated, and on the fifteenth day of November, 1955, were tried together on the merits. The majority of the allegations in each petition were not in dispute.

On the twenty-ninth day of May, 1956, the trial court entered its judgment finding and declaring all three ordinances to be "invalid, unconstitutional and void, insofar as they prohibit the ownership, possession, custody, control and operation of pin games for amusement purposes only" and permanently enjoined the city of Columbus "(a) from interfering * * * with the ownership, possession, cus-

tody, control and operation of said pin games * * * as well as (b) from * * * interfering with or molesting any merchant with whom said plaintiffs have either heretofore had, or may hereafter have contracts for the operation of said games so long as said games are not used for gambling, * * *." (R. 34)

Thereupon respondents perfected appeals on questions of law and fact to the Court of Appeals of the Second District and the Court of Appeals of the Sixth District, sitting by designation, held that all three ordinances are not in violation of the Fourteenth Amendment to the Constitution of the United States, and dismissed each action. (Appendix C hereto, infra. (pp. 52-62; R. 19-20; 41-42)

The petitioners then perfected appeals involving constitutional questions to the Supreme Court of Ohio, which court, on the eighteenth day of December, 1957, affirmed the judgments of the Court of Appeals of the Sixth District and on the fifteenth day of January, 1958, denied timely applications for re-hearings. (R. 234-236; 245-247)

HOW FEDERAL QUESTIONS ARE PRESENTED

The federal questions presented by this petition were specifically raised in the trial court and Court of Appeals (the latter being a de novo hearing on the same pleadings) by the petition in each case. (R. 1-9; 21-28) The petition in each case contains specific references to the appropriate sections of the Constitution of the United States involved. (R. 5-7; 24-28) Questions 1 to 6 inclusive were raised in the Supreme Court of Ohio by the pleadings, and assignments of error in each case (R. 237-238, 249), and question 7, which arose for the first time in the Supreme Court of Ohio, was specifically raised by applications for re-hearings in that court. (R. 242-243, 254)

Questions 1, 2, 5 and 6 were answered in the negative by the Supreme Court of Ohio in its opinion printed in Appendix D hereto, infra, pp. 62-82; R. 255-276. In the last paragraph of its opinion the Supreme Court declined to answer questions 3 and 4 on the ground that such answers "might be considered as dicta," Appendix D hereto, infra, p. 82; R. 276. Question 7 was answered in the negative by a denial of the petitioners' applications for re-hearings (R. 235, 246).

REASONS FOR GRANTING THE WRIT

1. When the motions to certify the records of the Court of Appeals in these cases were submitted to the Supreme Court of Ohio, respondents conceded in their brief that "the questions involved are of public and great general interest" and that court allowed each motion on that ground. The federal questions presented by this petition have constantly been before other state and federal courts throughout the United States. State courts in Florida, Illinois, New Jersey, Oklahoma, Pennsylvania, and Texas have decided these questions in a manner directly opposite from the decision of the Supreme Court of Ohio in the instant cases. *Deeb v. Stoutamire*, 53 So. (2d), 873 (Fla.); *People v. One Slot Machine*, 303 Ill. App., 337; *People v. One Pin Ball Machine*, 316 Ill. App., 161; *State v. Betti*, 23 N. J. Misc., 169; *Sterling Distributors Inc. v. Director of Public Safety*, 135 N. J. Eq., 508; *Couch v. State*, 71 Okla. Cr., 223; *In re: Petition of Chief County Detective*, 54 Dauphin County Reports, 16 (Penn.); *Commonwealth v. Handmore*, 60 Dauphin County Reports, 416 (Penn.); *Urban's Appeal*, 148 Super. Ct., 101 (Penn.); *Commonwealth v. Mihalow*, 142 Super. Ct., 433 (Penn.); *Wiaton's Return*, 151 Super. Ct., 337 (Penn.); *Hightower v. State*, 156 S. W. (2d), 327 (Texas).

The classification for purposes of federal taxation under 26 U. S. C., Sections 4661-4663 of pin games equipped to give free games and payoffs was decided by this Court in *United States v. Korpan*, 354 U. S., 271. Similar tax questions involving these games have been decided by the lower federal courts. *Johnson v. Phinney* (C. A. 5), 218 Fed. (2d), 303; *United States v. Two (2) "Exhibit Rotary" Coin Operated Gambling Devices* (D. C. Okla.), 107 Fed. Sup., 314; *Robique v. Lambert* (D. C. La.), 114 Fed. Sup., 305 (affd. 214 Fed. (2d), 3 (C. A. 5)); *Tooley v. United States* (D. C. Nev.), 134 Fed. Sup., 162.

Petitioners also claim that in the instant cases the Supreme Court of Ohio has decided important and substantial questions which have not heretofore been determined by this Court or has decided them in a way which is probably not in accord with the applicable decisions of this Court.

2. This Court has held that where, as in the instant cases, a suit is brought to this Court from a state court which involves the constitutionality of ordinances enacted by a municipal corporation in that state, this Court will, when necessary, put its own independent construction upon such ordinances. *Yick Wo v. Hopkins*, 118 U. S., 356.

3. The record shows that the pin games involved in these cases are not equipped to give free games or payoffs but have been played for amusement purposes only (R. 80, 110-111, 114, 117, 121, 127-128, 142). It was so held by the trial court who heard the testimony. (Appendix B hereto, infra, pp. 45, 51) They were so treated by both Court of Appeals (Appendices A and C hereto, infra, pp. 24, 55) and the Supreme Court of Ohio. (Appendix D hereto, infra, p. 64; R. 257). They are, therefore, nothing but amusement devices within the meaning of 26 U. S. C., Section 4462 (a) (1). *United States v. Korpan*, 354 U. S., 271, is not controlling in the instant cases because, as above stated, the

games there involved were equipped to give free games and payoffs. They were therefore, classified by this Court under 26 U. S. C, Section 4662 (a) (2).

4. Petitioners claim that where, as in the instant cases, pin games are operated purely for amusement purposes only, such operation is a business which may be regulated but which may not be prohibited by a municipality as has been attempted in these ordinances. The Court of Appeals of the Second District so held. (Appendix A hereto, infra, pp. 24-25) The trial court so held on the evidence. (Appendix B hereto, infra, p. 51) A classic statement of the general rule is found in 10 *Ohio Juris.* (2d), 506, Sections 428-429, which read as follows:

> "428. No trade can be prohibited altogether unless the evil is inherent in the character of the trade. Any law which prohibits altogether an occupation the prosecution of which does not necessarily work an injury to the public is unwarranted. It is not sufficient that the public sustain harm from a certain trade or employment as it is conducted by some who are engaged in it. Nor is it sufficient that all remedies for the prevention of the evil which fall short of total prohibition prove defective. The fact that many men engaged in the calling persist in so conducting the business that the public suffer, and their actions cannot otherwise be effectually controlled, is no justification for a law which prohibits an honest man from conducting the business in such manner as not to inflict injury upon the public.
>
> "429. If a business or occupation can be prosecuted under certain limitations so as to avoid injury to others, the police regulation must be confined to the imposition of these needed restrictions and the trade cannot be absolutely prohibited."

That the right to pursue an ordinary trade or business is protected by the Fourteenth Amendment has been consistently recognized by this Court. *Powell v. Pennsylvania,*

127 U. S., 678, 684, *Allgeyer v. Louisiana*, 165 U. S., 578, 589; *Meyer v. State of Nebraska*, 262 U. S., 390, 399. Petitioners, therefore, claim that so long as pin games are, as in the instant cases, used for amusement only it is a lawful business and any ordinance which attempts, as here, to prohibit such operation amounts to a denial of due process of law under that amendment. No claim is made that the operation of these games is an inherently evil business. It has been repeatedly held by the Ohio courts that these games are not gambling devices per se. *Brafford v. Calhoun*, 72 Ohio App., 333; *Wells v. City of Norwood*, 64 Ohio Law Abstract, 53; *Benjamin v. City of Columbus*, 73 Ohio Law Abstract, 143.

The mere possibility that these games may be used as a means for gambling does not justify their prohibition. If this were true all games would be subject to prohibition because they have the same possibility. It is, therefore, a case for reasonable regulation instead of prohibition. *Carolene Products Company v. Thomson*, 276 Mich., 172; *Carolene Products Company v. Banning, et al.*, 131 Neb., 429; *Erwin Billiard Parlor v. Buckner*, 156 Tenn., 278; *Riley v. Sweat*, 110 Fla. 362; *Sports Daily v. Public Service Commission*, 179 Md., 355, 359; *Hagerman v. City of St. Louis*, 283 S. W. (2d), 623 (Mo.). This is especially true since these ordinances prohibit the possession of these games at any place within the city limits, whether public or private. In fact, the trial court said that these ordinances would make it a crime to have these games in a private home for purely private use. (Appendix B hereto, infra, p. 51) In *Dallman v. Klachesky*, 229 Wisc., 169, the court said that if such a prohibition extended throughout the city "there might be some doubt as to the reasonableness of the ordinance." We, therefore, claim that these ordinances are too broad and sweeping to meet the test of

the Fourteenth Amendment. Where such ordinances have been limited to places of business or other places of public resort, the California courts have upheld them on the ground that they are purely regulatory. *In re: Lawrence*, 55 Calif. App. (2d), 491; *Sharpe v. Johnson*, 81 Calif. App. (2d), 939.

The Ohio courts which have upheld these ordinances relied, among other authorities, upon *Murphy v. California*, 225 U. S., 623. As stated by this court in that case, "Playing at billiards is a lawful amusement * * *." (p. 629) In fact, many people have billiard tables in their family recreation rooms. We submit, however, that the *Murphy* case is not in point for the following reasons:

(a) The ordinance there involved sought not to prohibit the operation of billiard halls but to regulate them by limiting their operation to hotels having 25 or more rooms (pp. 627-628).

(b) The ordinance was "not aimed at the game but at the place" (p. 629). In the instant cases these ordinances are aimed at the game rather than at the place because their operation is prohibited within the limits of the municipality.

(c) This Court apparently held that an ordinance regulating billiard halls is not prohibited by the Fourteenth Amendment where such ordinance is not in conflict with or prohibited by the Constitution or statutes of the state. In the summary of the brief of the defendant-in-error in that case it is stated that under Article XI, Section 11 of the California Constitution, municipalities were authorized either to regulate or prohibit and that under such power they could prohibit that which is not a nuisance per se (p. 626). This Court, therefore, held that under the Constitution and statutes of California, South Pasadena was authorized to enact this ordinance regulating billiard halls

(p. 630). We maintain, however, that both the Constitution and statutes of Ohio deny to the municipality the right to enact these three ordinances prohibiting pin games. Article XVIII, Section 3 of the Ohio Constitution (infra, p. 5), provides that "municipalities shall have authority * * * to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." It will be observed that this section uses the word "regulation" instead of "prohibition". In *Frecker v. City of Dayton*, 88 Ohio App., 52, the Court of Appeals of the Second District held that the word "regulation" as used in that section does not include the word "prohibition" unless the occupation, trade or business is an inherently evil one. This decision was affirmed by the Supreme Court of Ohio in *Frecker v. City of Dayton*, 153 Ohio St., 14. Inasmuch as the operation of these pin games is not an inherently evil occupation, trade or business, we claim that these three ordinances are in conflict with said provision of the Ohio Constitution. Furthermore, Section 715.51 of the Revised Code of Ohio (infra, p. 5), provides that "any municipal corporation may * * * (B) Authorize the destruction of instruments or devices used for the purpose of gambling." Inasmuch as these pin games have not been used for gambling we claim that these three ordinances which prohibit their use for any purpose are in conflict with said statute. If, therefore, we are correct in our contention that these ordinances are in conflict with the statutes and Constitution of Ohio then it would seem that under the *Murphy* case they are barred by the Fourteenth Amendment.

(d) No claim was made in the *Murphy* case that the ordinance was being unequally enforced (p. 631). In the instant cases we claim that the petitioners are being denied

the equal protection of the law in that Ordinances Nos. 156-53 and 157-53 are being unequally enforced.

(c) The *Murphy* case clearly recognizes the distinction between regulation and prohibition. In the first head note this Court held that "While the Fourteenth Amendment protects the citizen in his right to engage in any lawful business, it does not prevent legislation intended to regulate useful occupations, which because of their nature and location, may prove injurious or offensive to the public." In the second head note the court held that "The Fourteenth Amendment does not prevent a municipality from prohibiting any business which is inherently vicious and harmful." This distinction was also recognized by this Court in *McCloskey v. Tobin, Sheriff*, 252 U. S., 107. Under the Fourteenth Amendment, therefore, any business which is inherently vicious and harmful may be prohibited but any business which is not inherently vicious or harmful but which might, because of its nature or location, become so can only be regulated. While we do not concede that pin games may become injurious or offensive to the public, we do concede that they may be regulated.

5. Sections 1 and 6 of Ordinance 157-53 prohibit the operation of any game which, as a result thereof, registers a score. In *Ferauson v. City of Columbus* (70 Ohio Law Abstract, 277), the Court of Appeals of the Second District held that the registration of a score is not an element of gambling. If the respondents desired to be fair, they would, in the enforcement of these ordinances, seize and confiscate any game which registers a score because the ordinances by their express terms would apparently justify such action. Instead of doing so, however, the respondents have expressed an intention of seizing and confiscating no games except pin games (R. 31; 85-87; 125-126). This Court will take judicial notice of the fact that every sport

or contest registers some kind of a score; that any amusement device or game can be the means of gambling and that people gamble with cards or on the outcome of bowling, tennis, golf, football, baseball and other games of amusement. To single out, therefore, an amusement device or game and seize and confiscate it merely because it happens to use a pinball whereas some other game uses a different kind of ball is discrimination in the enforcement of the law. If one game is to be seized because it might be used for gambling then all games having similar possibilities should likewise be seized. If, therefore, we assume that these ordinances are lawful on their face and fair in their terms, their enforcement would be of such a character as to work a discrimination among those who legally come within their provisions and would, therefore, deny to the petitioners the equal protection of the law within the meaning of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U. S., 356, 373-4; *Dobbins v. Los Angeles*, 195 U. S., 223. Such discrimination is unreasonable because it offends "the plain standards of common sense." *Hartford Steam Boiler Inspection and Insurance Company v. Harrison*, 301 U. S., 459, 462.

In *Loof v. City of Long Beach* 314 Pac. (2d), 518 (Calif. App.), decided on the twelfth day of August, 1957, an action was brought to restrain the enforcement of an ordinance regulating games in that city. The ordinance prohibited a balloon-dart concession and a knife throwing concession but permitted games of archery, baseball, basket ball and quoits. Both groups of games included some factors of skill. The court held (1) that evidence bearing on the question of unreasonable discrimination in prohibiting the first group of games was admissible and (2) that the classification was unreasonable and, therefore, amounted

to a denial of the equal protection of the law under the Fourteenth Amendment.

6. Section 3 of Ordinance No. 156-53 provides that the city auditor shall not issue a license or registration for any game which tends to encourage gambling. Section 4 of Ordinance No. 157-53 provides that every game which tends to encourage gambling shall be subject to seizure by any police officer. In determining whether these games tend to encourage gambling the ordinance sets up no standard by which such city auditor or officer may be guided but leaves such determination to his sole discretion. The ordinance, therefore, attempts to confer judicial power on both the auditor and the police officer and thereby deprives the petitioners of due process of law as well as of the equal protection of the law within the meaning of the Fourteenth Amendment. *Ferguson v. City of Columbus*, 70 Ohio Law Abstract, 277; *Yick Wo v. Hopkins*, 118 U. S., 356; *Panama Refining Company v. Ryan*, 293 U. S., 388; *Schechter v. United States*, 295 U. S., 495.

7. Certain phrases contained in Ordinances Nos. 156-53 and 157-53 are so vague, indefinite and uncertain as to constitute a denial of due process of law within the meaning of the Fourteenth Amendment. These phrases are, "which in no way tends to encourage gambling," contained in Section 1 of Ordinance No. 156-53; "which tends to encourage gambling," contained in Section 2 of said ordinance; "which tends in any way to encourage gambling," contained in Section 3 of said ordinance; "which tends to encourage gambling," contained in Section 1 of Ordinance No. 157-53; "which is adapted or may readily be converted into such gambling device, or instrument," contained in Section 1 of Ordinance No. 157-53; and "any device easily convertible to automatic payoff or free play by slight changes in, or additions to the mechanical structure," contained in Sec-

tion 4 of said Ordinance No. 157-53. This Court has repeatedly held that any statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application, lacks the first essential of due process of law. *Collins v. Kentucky*, 234 U. S., 634; *Connolly v. General Construction Co.*, 269 U. S., 385; *Lanzetta v. New Jersey*, 306 U. S., 451; *Burstyn v. Wilson*, 343 U. S., 495; *United States v. Cardiff*, 344 U. S., 174.

We contend that these phrases fail to meet the requirements of due process within the meaning of the Fourteenth Amendment. They are so vague, indefinite and uncertain that men of common intelligence must necessarily guess as to their meaning and differ as to their application. We doubt if any two judges or lawyers would agree in a given situation as to their meaning and application.

8. Petitioners allege that the respondents have threatened to arrest the merchants who operate these games under contract in their business establishments; that said merchants have been placed in fear by said threats and have proposed to remove said games from their premises—all in impairment of the obligation of the petitioners and said merchants under said contracts and in violation of Article I, Section 10 of the Constitution of the United States. (R. 5-6; 24-25) It is well settled that a municipal ordinance is a "law" withir the meaning of that provision of the federal Constitution; that the word "contract" is used in its usual and popular sense (*Crane v. Hahlo*, 258 U. S., 142, 146), and that an "impairment" results where a legislative act takes from a party thereto a right to which he is entitled thereunder. If, therefore, as in the instant cases the obligation is entirely destroyed, then

that obligation has certainly been impaired. We recognize the fact that this constitutional provision is subject to a reasonable exercise of the police power. We maintain, however, that the enactment of these ordinances was an unreasonable exercise of such power.

9. Petitioners claim that these ordinances are so unreasonable, arbitrary and capricious that their enactment amounted to an unreasonable exercise of the police power and, therefore, a denial of due process of law within the meaning of the Fourteenth Amendment. *Nebbia v. New York*, 291 U. S., 502, 525. They prohibit the possession, custody or control of games which have been played for amusement only. There is nothing in this record which shows that the prohibition of these games as distinguished from their regulation is essential to the public welfare.

10. On page 114 of its opinion, Appendix D hereto, infra, pp. 77, R., 270-271, the Supreme Court of Ohio refers to evidence offered by the petitioners in support of their contention that these games do not have evil potentialities. The court then quotes from *Murphy v. California*, 225 U. S., 623, to the effect that judicial notice may be taken that billiard halls do have such potentialities. Billiard games and pin games are, of course, two different types of amusement. If, however, we assume that they have similarities, judicial notice merely relieves the party who ordinarily would be required to prove a given fact from the necessity of so doing. We do not understand that that rule either precludes or prohibits the adverse party from introducing evidence to the contrary. *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*, 301 U. S., 292, 301-2. It would seem, therefore, that the evidence offered by the petitioners should have been considered by that court and that its failure to do so amounted to a denial

of due process within the meaning of the Fourteenth Amendment.

CONCLUSION

For the foreg ing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

WAYMON BELTON MCLESKEY,
OWEN B. SHERWOOD,
Attorneys for Petitioners.

APPENDIX A

No. 5156—C. D. Ferguson, et al., Plaintiffs-Appellants, v. The City of Columbus, et al., Defendants-Appellees.

Opinion of the Court of Appeals

(Rendered on the 30th day of November, 1954.)

By the Court:

This is an appeal on questions of law from a judgment of the Common Pleas Court sustaining a motion of the defendant, The City of Columbus for judgment on the pleadings, and dissolving a temporary restraining order.

The pleadings were a petition and an amended joint answer. The petition sought a temporary restraining order and permanent injunction to prevent the city from seizing and destroying certain pinball games in possession and use on merchants in the City of Columbus, so long as the pin games described in the petition are played for the purpose of amusement only, and not played in any manner in violation of such of the provisions of the ordinances set out in the petition which plaintiffs concede to be valid. A temporary restraining order was allowed by one branch of the Common Pleas Court, as follows:

> "The court orders, adjudges and decrees that a temporary restraining order against the defendants be and the same is hereby allowed, as prayed for in the petition, so long as the pin games described in the petition are played for the purpose of amusement only, and so long as the players thereof do not win or receive, directly or indirectly, any merchandise, cash, checks, tokens, freeplays or anything of value as a prize or reward for playing any of said pin games. In the event that any of said pin games are played as gambling devices, i.e., in the event that any merchandise, cash, tokens, checks, freeplays or anything of value is won or received, directly or indirectly, by the player as a prize or reward for playing any of said pin games

described in the petition, or played as gambling devices in any way, the defendants shall be permitted to seize them whenever they are so played and to destroy them in accordance with law."

We analyze the pleadings to determine if they present an issue on any material averment of the petition which, if resolved in favor of the plaintiffs would entitle them to any of the relief prayed for.

(1) The petition alleges the corporate and official capacities of defendants and that the officer defendants are charged with the enforcement of the ordinances set out, viz.: Nos. 156-53 and 157-53 of the Ordinances of the City of Columbus, Ohio; that plaintiffs own and operate 540 amusement games known as pin games of the value of one hundred ninety-nine thousand dollars; that they are operated by merchants in the City of Columbus under contract with the plaintiffs, both parties sharing the profit. All of the foregoing is admitted by the answer.

(2) Plaintiffs further aver that under and by virtue of the above-mentioned ordinances, the defendant officers threaten to seize the games, to confiscate them and to arrest and imprison the merchants with whom said plaintiffs have contracts. The answer admits that the defendant officers are threatening to seize the games operated by plaintiffs but by their general denial deny that they are threatening to confiscate the games or to arrest and imprison the merchants with whom plaintiffs have contracts.

(3) The method of operation and play and the mechanical construction of the pin games is set out in detail. This is admitted by the answer.

(4) It is further averred that no merchandise, checks, tokens, or any other objects are released by said game; that there is no return or free-plays; that each player receives identically the same number of balls from each

machine for each five cents inserted therein; that the player endeavors to make as high a score as possible and that the play is for amusement only; that said games do not tend to encourage gambling and are not gambling devices within the meaning of said ordinances. All of the foregoing under (4) is denied.

(5) The petition further avers that the ordinances are unconstitutional in that they, 1. Authorize seizure and confiscation of games without proof of their use for gambling purposes; 2. They impair the obligation of contract; 3. They take owner's property without due process of law; 4. Are so vague, indefinite and uncertain as to constitute a denial of due process of law; 5. Deny the owners equal protection of the law; 6. Constitute an unreasonable exercise of "Police Power"; attempt to delegate judicial and/or legislative power. All of the foregoing under (5) is denied.

(6) The petition further avers that the ordinances described in the petition amended former ordinances which permitted the licensing and registration of the games owned and operated by plaintiffs. This is admitted.

There are certain controlling legal principles which we briefly state as preliminary to consideration and determination of this appeal.

A motion for judgment on the pleadings should be overruled if the pleadings disclose an issuable fact, or a direct issue, joined upon a single material proposition which require the introduction of testimony. If the averments of the petition are sufficient to stand against a general demurrer, judgment on the pleadings may not be granted. The motion presents only a question of law. Before the motion may be sustained it must be held, as a matter of law, that the plaintiff has stated no cause of action. Meyer v. Daniel, 147 O. S. 27. Vest v. Kramel, 158 O. S. 78; Zepp v. City of Columbus, 50 O. App. 47. The Court should exer-

cise great caution in sustaining a motion for judgment on the pleadings. Ellis v. Electric Products, Inc., 85 O. App. 170. The Court is required to construe the pleadings liberally in favor of the party against whom the motion is made. If the petition states no cause of action supporting any relief prayed, the judgment must be affirmed. If the petition states a cause of action and the answer denies any material averment of the petition an issue is drawn which must be resolved upon testimony adduced.

The ordinances involved are lengthy and we shall not undertake to set them out in their entirety, making reference only to those sections which, though numerous and lengthy, it is necessary that we consider to determine the questions presented.

We first give attention to the penalty and confiscation provisions of the sections of the ordinances. Plaintiffs aver that the defendants are threatening to seize the games, to confiscate them, to arrest and imprison the merchants with whom the plaintiffs have contracts. The defendant officers admit only a purpose to seize the games but deny the other averments.

It is our conclusion that the ordinances given full force and effect, if the averments of the petition are proven, do not authorize, nor purport to empower, the defendant officers with the right to confiscate the machines, or to arrest and imprison the merchants with whom plaintiffs have contracts.

It is not contended by defendants that the machines are gambling devices per se, nor will the averments of the petition permit the conclusion that they are now or have been used as gambling devices or played for gain. Although both ordinances contain sections, which we hereinafter discuss, carrying controversial language that, in the main,

has provoked this suit, neither the penalty nor the confiscation sections of the ordinances incorporate or make a basis for punishment of the merchants or destruction of the machines, the provisions of the ordinances concerning which the principal issues are raised. We shall attempt to demonstrate this.

Section 36.60 of Ordinance No. 156-53 authorizes seizure and destruction of any machines, etc., pursuant to the provisions of 29.39, Chapter 29 of the 1952 Code of Columbus, if the machine

> "tends to encourage gambling *and* may be used in a manner violative of the Code of the City of Columbus, Ohio, 1952, Chapter 29, Sections 29.38, 29.38-1, 29.40, 29.42, 29.42-1, and 29.42-2, as they now are, or may hereafter be amended."

The provisions of Section 29.39, Chapter 29, of the 1952 Code of Columbus authorize destruction only upon adjudication "by the Courts" that such machines were used for the purpose of gambling. Nor does this section, as amended, empower defendants to seize or destroy the machines, if plaintiffs maintain the averments of their petition. It is a prerequisite of this section, to authorize the seizure or *destruction* of the machines, that they "be used for the purpose of gambling, or on, by, or with which money or any other thing or article of value may be won or lost". That is to say, that the machines must be per se gambling devices or used for gambling before they can be destroyed. This authorization is as broad but no broader than the law authorizing the seizure and destruction of contraband articles. The section further provides that a machine shall not be demolished or destroyed except upon direction of the Mayor or the Director of Public Safety, "upon it being adjudged by the courts that such machines, devices or instruments were used, kept or intended for the purpose of gambling". Clearly a valid enactment.

The fine and sentence provisions are all found in Ordinance No. 157-53. The first is Section 29.38-1:

> "Whoever in the city permits any game whatsoever to be played for gain upon or by means of any machine, device or instrument, of whatever denomination or name, upon the premises of which he has the care or possession shall be fined", etc.

Upon the petition the merchant operators could not be convicted under this section of the ordinance because it is averred that the machines are not played for gain.

The next penal section is 29.42 of Ordinance No. 157-53:

> "Any person who shall within the city * * * have in his possession for any commercial use, financial gain, or compensation, any coin or token operated gambling device, shall be guilty of a misdemeanor and upon conviction thereof shall be fined, etc. * * * For the purpose of this section, 'gambling device' shall mean and include any device having an automatic pay-off or an automatic free-play mechanism or any device easily convertible to automatic pay-off or free-play by slight changes, in, or addition to the mechanical structure, or any coin or token operated device actually used for gambling purposes, any of which in the operation of such device the player stands a chance to gain an award or property of greater value than the consideration paid."

The amended petition will not permit of the conclusion that the machines there described in detail are included in the foregoing definition of a "gambling device", and the section does not authorize the arrest of the merchant operators of the machines.

The next penalty section is 29.42-1:

> "Whoever keeps or exhibits for gain a coin-in-slot machine or device, where the merchandise, property or checks obtained by play or operating such machine or device is not for each operation thereof substantially equal in value or where the number of units of property or checks is not, for each operation, equal in number and value, shall be fined", etc.

This section also makes it an essential to conviction that the machine be kept or exhibited for gain and the other conditions of the section must apply. They are not found or inferable from the petition.

Neither Section 29.38-1, Section 29.42, Section 29.42-1 of Ordinance No. 157-53, nor Section 25.30 of Ordinance No. 156-53 authorizes the arrest of the merchants with whom defendants have contracted, or the confiscation of any of the machines involved, if the averments of the petition are proven.

The next section, 29.42-2:

> "Whoever exhibits, operates or permits the operation of any machine, device or instrument whether or not it purports to vend or distribute merchandise or to furnish recreation or amusement, which is caused to operate by the insertion of any token, slug or disc, or exhibits or operates, or permits the operation of any machine, device or instrument which is caused to operate by the insertion of any coin, whether such device, machine or instrument purports to vend or distribute merchandise or to furnish recreation or amusement, which as a result of such operation discharges one or more coins, tokens, slugs, or discs or other memorandum, *or which registers odds or a score of the result of operation which makes it possible for one user to receive more value than another user inserting a similar coin* shall be guilty of a misdemeanor and upon conviction thereof shall be fined," etc. (Emphasis ours)

It will be noted that this section does not specifically authorize the seizure, confiscation or destruction of the machines. It is a penal section providing for fine and imprisonment for violation. Of course, if the operators were convicted for its violation the machines could then be confiscated.

It may also be observed that if Section 35.30 of Ordinance No. 156-53, seizure and confiscation, be given full meaning, it is necessary to its violation that it be proven

not only that the operation of the machine tends to encourage gambling, but also that it offends against the provisions of one or more of the sections to which reference is therein made. But Section 29.42-2, penal only, is in the alternative. That is to say, the proof is sufficient if it appear either that the operation of the machine tends to encourage gambling or that any of the other specific terms of the section are violated.

If the plaintiffs can maintain the averments of their petition the merchant operators may not be successfully prosecuted under Section 29.42-2 of Ordinance No. 157-53. There is an issue in the pleadings, as to the violation of any of the provisions of this section of the ordinance. The petition avers categorically that the operation of plaintiffs' machines does not come within any of the inhibitions of the section. It must also be noted that the language of Section 29.42-2, hereafter discussed, relating to the registration of a score, etc., is different from that employed in Section 29.28, the nuisance section, which reads: "Or which registers odds or a score", without further qualification.

There is no issue on the question whether or not the machines register a score. This is asserted and admitted. However, the petition does not admit, nor is it averred by the defendants, that the registration of a score makes it possible for one user to receive more value than another user inserting a similar coin.

As it is alleged that the defendants are threatening not only to seize but to confiscate the machines and to arrest the operators of them, the petition alleging that they have no authority to confiscate and stating facts which, if true, support their contention, the court to which this case was presented, in the light of the other averments of the petition as to the destruction of property and multiplicity of

suits, should have exercised its discretion to determine whether or not any injunctive relief should have been accorded plaintiffs in the respect of arrest of the operators and the confiscation of the machines.

The materiality of the issue as to the right of defendant officers to seize the machines under the only other applicable Section, 29.38 of Ordinance No. 157-53, presents a more serious question. We have heretofore stated that there is no provision in Ordinance 156-53 which will support a seizure against the averments of the petition.

Section 29.38 provides:

> "It is hereby declared prejudicial to the public good, detrimental to the public morals and a nuisance, for any person to exhibit for the purpose of operating or to permit the operation of any machine, device or instrument in the City of Columbus, Ohio, of whatever kind or description, or by whatever name known or commonly referred to which *tends to encourage gambling, or which registers odds or a score*, or which is adapted, or may readily be converted into such machine, device or instrument that is adapted, for use in a manner violative of Sections 29.38-1, 29.42, 29.42-1, and 29.42-2 of this chapter, and every machine so exhibited or permitted to be operated shall be subject to seizure, *by any police officer of the city*, and no such machine, device or instrument so seized by any police officer of the city, whether under the authority of this section or Section 29.39 or otherwise, shall be returned to the owner or person claiming the same except pursuant to an order of a court of competent jurisdiction." (Emphasis ours)

This section permits the seizure of the machines if they register odds or a score without the qualifying language which is carried into the penalty section of Section 29.42-2. It also authorizes the seizure of the machines if their operation "tends to encourage gambling", another provision that is not carried into the other penalty provisions of the

ordinances. The section further authorizes any police officer to make the seizure, that is to say, if a police officer determines that the machines "tend to encourage gambling" he may seize them. This section of the ordinance not only sets out the essential requisites upon which seizure may be made, but incorporates the other sections of the ordinance and provides that if the machines come within any specific characterization of the section or are violative of any other named sections of the ordinances, they may be seized. We have heretofore referred to Section 29.38-1, Section 29.39, Section 29.42-1, and Section 29.42-2.

Section 29.38, especially as to some of its controverted terms raises the question whether the city has exceeded its police power in its enactment. Here it is admitted that the machines register a score and that is the only admission that the machines in their operation offend against any of the essentials of the penal provisions of the ordinances. Plaintiffs deny specifically that their machines tend to encourage gambling. Inasmuch as the section makes a machine the operation of which tends to encourage gambling subject to the ordinance, it is evident that this may be found independent of the other elements set out in the section which characterize the operation of the machines as a nuisance.

The provision for seizure, of Section 29.38 of the ordinance under consideration, is invoked upon the declaration that operations such as are therein defined constitute a nuisance which may be abated. The city has wide police power in defining and declaring what shall constitute a nuisance. Insofar as the section authorizes seizure of machines that are gambling devices, per se, or operate in a manner described which is recognized as gambling there is no doubt as to its validity, but

> "The mere declaration in an ordinance that it is enacted to protect public safety, health or morals will

not render it valid as being within the police power unless there is some reasonable relation between such purpose and the regulations prescribed."

Youngstown v. Kahn Bros. Bdgs. Co., 112 O. S. 654.

In Williams v. Sandles, 93 O. St. 92, it was held:

"It is competent for a lawmaking body to authorize the summary seizure of property incapable of any except illegal use. The police authority of the state may be properly invested with power and devices as are designed and intended for use in the commission of crime."

8 O. Jur. 450, 451.

"A municipality cannot arbitrarily by ordinance declare property to be a nuisance and destroy it unless it is, in fact, a nuisance."

8 O. Jur. 452; Deming v. Cleveland, 22 O. C. C. 1; Borger v. State, 1 O. C. C. N. S. 549, affd. without opinion, 70 O. S. 508; Grundstein v. Ashland, 25 O. N. P. N. S. 493.

"And whether a nuisance exists is a question of fact frequently to be determined from the evidence."

8 O. Jur. 452; Bliss v. Krous, 16 O. S. 54.

In Grieb v. Dept. of Liquor Control, 153 O. S. 77, it is said that,

"While the legislature may authorize the summary confiscation of property incapable of lawful use or of nuisances per se, if property which is innocent in its ordinary and proper use has been used for unlawful purposes, it is beyond the power of the legislature to order its summary forfeiture to the state as a penalty or punishment for such use without giving its owner an opportunity for a hearing."

The principle of the Grieb case is recognized in the provision in the ordinances wherein confiscation and destruction are authorized.

The Legislature can prohibit only those uses of property which are hurtful to the public, and the inhibited use must be hurtful in a legal sense. State, ex rel. Monnett v. Buckeye Pipeline Co., 61 O. S., 520.

We do not hold that the ordinance is invalid because it characterizes as a nuisance the operation of a machine, therein described, "which tends to encourage gambling". It is the method of making determination of this essential of a nuisance as a basis of a seizure of the machine which we cannot support.

There is no authority in the statutory law for the seizure of the machines here under consideration upon the averments of the petition, other than as incident to conviction. R. C. 2915.15 (13066), R. C. 2915.16 (13066-1), R. C. 2915.17 (13066-2). It follows that the right of the defendant officers to seize the machines, if it exists, must be grounded upon the authority of the ordinance.

It is not necessary to decide the issues of the constitutionality of the ordinances except insofar as is required to determine if upon any theory the sustaining of the motion for judgment on the pleadings was proper. Village of Strongville v. McPhee, 142 O. S. 534; American Cancer Society, Inc., v. Dayton, 160 O. S. 114. Even with this limitation we are required to pass upon the provision of the section of the ordinance under consideration, that the registration of a score by the machine constitutes its operation as a nuisance and authorizing seizure if its operation tends to encourage gambling.

We are committed to the opinion that to grant to police officers, or the City Auditor, as in Section 35.33, Ordinance No. 156-53 the power of determining that the operation of the machine here involved "tends to encourage gambling" is too broad and is a judicial power which cannot be delegated to enforcing or licensing officials. Likewise,

that in the operation of a machine the mere registration of a score may not be declared to be an element of gambling. State, ex rel. Dana v. Gerber, 79 O. App., 1; Stanto v. Tax Commission, et al., 114 O. S., 658, 673. We recognize that this was a civil action but the principles announced have application here. The mere possession of articles which are not gambling devices per se or which are not used for gambling and which the possessor has no intention of using for or in connection with gambling purposes may not be seized.

We consider some Ohio cases pertinent to the question of what constitutes gambling or gambling devices. There are two Ohio cases in which one of the parties is named Krauss. The first, State v. Krauss, 114 O. S., 342; the second, Krauss v. City of Cleveland, et al., 135 O. S. 43. As we read them they both had under consideration what was known as the "Morris" Slot Machine.

In the first case, Krauss had been arrested in a Justice of the Peace Court of a township in Hamilton County on a charge that he unlawfully kept and exhibited for gain a certain gambling device, commonly known as a slot machine, in violation of Section 13066, G. C. It appeared that the machine was operated with 5 cent coins and ejected candy mints and coupons. It also had a sign on it, "Operating this machine with anything but a U. S. 5 cent coin or making two or more consecutive purchases herein positively prohibited". The testimony was that the prosecuting witness had played the machine three consecutive times, that he received mints on each play, and that in addition on the second play he received checks. These checks were not presented for redemption in merchandise. The defendant was convicted. The Common Pleas and Appellate Courts reversed the judgment and the Supreme Court in a per curiam supported the reversal, saying that

until it appeared that the machine was consecutively played, "or some other manner of play, as a result of which premiums, checks, or coupons are received, which secure to the player something for nothing, as a result of his play, we fail to see how there can be a violation of the statute."

The second case was a taxpayer's suit seeking to declare an ordinance of the City of Cleveland invalid because it authorized licensing of gambling devices per se. The trial court granted the injunction. The Court of Appeals reversed. The case was certified to the Supreme Court and in a per curiam the court reversed the judgment of the Court of Appeals. This case, in our judgment, clearly overruled the pronouncement in the former Krauss case but it was not mentioned in the latter opinion. While the former Krauss case was the law this court followed it. Later, we followed the pronouncement of the second Krauss case.

It is vital to determine just what the second Krauss case held respecting amusement as a thing of value. It clearly appeared that the machines under consideration returned tokens as a matter of chance upon certain plays. The Court, speaking at page 46, says:

> "However, for a game to constitute gambling, it must be one which is played for gain or money or a thing of value as the prize or reward."
>
> "Amusement is a thing of value. Were it not so, it would not be commercialized. The less amusement one receives, the less value he receives, and the more amusement, the more value he receives."

The amusement which the court held to be violative of the applicable statutes is clearly set out at the bottom of page 46 and the top of page 47 of the opinion:

> "The minimum amount of amusement offered in each play is that which is offered without any return of

tokens. *Whatever amusement is offered through the return of tokens is added amusement which a player has an uncertain chance of receiving. This added amount of amusement, the procurement of which is dependent upon chance, is a thing of value.*" (Emphasis ours)

The petition here avers that the machine ejects no tokens or other memorandum and that it can be played for amusement only. There is no added amount of amusement which is the thing of value constituting the prize or reward essential to gambling.

The case of People v. Gravenhorst, 32 N. Y. Supp. (2d) 760, cited by appellee, quotes in part from the second Krauss opinion. This case in which the opinion is well written and extensive, resulting in the pronouncement of twenty-four headnotes, treats of a coin operated pin ball game. However, it is evident that the machine there under consideration was different in many material particulars from the machine described in the petition here. The court stated the question presented, "as to whether or not, from the facts adduced at the trial this court may properly infer that this machine is suited or fit for such illegal use as was contemplated by the statutes". It appeared that, in small print on certain plays the panel on the machine became illuminated and the word "Winner" appeared. That there were two ways in which the machine could be played and upon the second type the player would be declared a winner if he made prior correct selection of points that the machine would register. It further appeared that there was a slot in the machine that indicated the number of nickels the storekeeper paid to the winner and it was developed that such payments were regularly made to winners. The court held that although slugs or tokens were not actually ejected, the machine by

its other notations performed all the functions of such slugs or tokens. It also is stated that by means of insertion of plugs into the back of the machine it could be changed in its operation and made to show less winners and therefore return fewer nickels to the player. The court held that the only conclusion to be reached were the small numerals, the register and the 10 plugs are considered together, is that they form an intricate method or system by which the machine is adapted for use as a gambling device. Of course, there are many other observations in the opinion, some of which tend to support the position of appellees, but the question decided is that which we have indicated and the facts well support the judgment there entered.

The latest case and one worthy of careful consideration because the opinion was written by Judge Bell, formerly a member of our Supreme Court, is, In re Westerhaus Co., Inc., v. City of Cincinnati, appended to appellants' brief, and also reported in 68 O. L. A. 293. There were three questions presented in this case, the first, whether the machines in question, pinball machines, there considered, constituted gambling devices. Second, the constitutionality of an ordinance of the City of Cincinnati authorizing the seizure and destruction of pinball machines. Third, the right of the City Treasurer to refuse a license based upon violation of the ordinance, covering the operation of pinball machines without judicial determination as to such violation. The principal question was whether or not free-play of the machines constituted them as gambling devices per se. It was contended that the devices involved were gambling devices per se. A machine was in evidence and it was played and the operation thereof carefully considered. The court held that the play was not a game of chance but controlled by the skill of the player. This con-

clusion, of course, cannot be accepted without proof in this case. As we read the petition it does not aver that the machines here are operated by the skill of the player. It also appeared in the cited case that when the game was completed, if the player scores a sufficient number of points he may play one or more games without the insertion of additional coins. That operation is not in this case. Notwithstanding the free-play aspect of the machines, the court held that they were not gambling devices and granted the injunction. Judge Bell also cited, discusses and differentiates the case of Zellas v. Matowitz, 22 O. O. 261, and held that it had been overruled by Bradford v. Calhoun, 72 O. App. 333.

The judgment in Zellas v. Matowitz was based upon the premise of the immediate adaptability of the machine under consideration for gambling purposes. The principle is not involved in this case by the pleadings, although it might develop upon proof and become material as to the right of plaintiffs to any injunctive relief.

We have held in Columbus Legal Amusement Association v. Columbus, 50 O. L. A. 354, that,

> "The seizure and destruction of amusement devices, operated by coins or slugs, which may be readily converted into gambling devices, summarily and without process of judicial proceedings does not deprive any one affected thereby of the benefits of due process of law under either the Federal or State Constitution."

We base our conclusion in part upon the 13th syllabus of People v. One Pin Ball Machine (Ill.), 44 N. E. (2d) 950:

> "The right exists, summarily, and without process of judicial proceedings, to seize and destroy contraband articles and to seize articles not inherently illegal when illegally employed."

It has been an onerous task to digest the ordinances involved but upon the pleadings nothing else would have

answered the determinative errors assigned. We respectfully suggest that the ordinances could well be redrafted, simplified and shortened without affecting their cental purpose and to the advantage of the City and any one affected.

Issues are made by the pleadings as to the right of defendant officers to seize the machines described in the petition, to confiscate them, or to arrest the merchant operators and as to their threats so to do which required the taking of testimony before the issues could be resolved for or against either party. The court erred in sustaining the motion for judgment on the pleadings and in dissolving the temporary injunction.

Judgment reversed and cause remanded.

Wiseman, P. J., Miller and Hornbeck, JJ., concur.

APPENDIX B

Court of Common Pleas, Franklin County, Ohio.

No. 191975—Ray M. Benjamin, et al., Plaintiffs, vs. The City of Columbus, et al., Defendants.

Decision of the Court of Common Pleas

(Rendered this 9th day of May, 1956.)

Reynolds, J.:

In this case plaintiffs seek to enjoin defendants from enforcing the provisions of Ordinance No. 1615-54, which makes it unlawful for any person to have a device commonly known as a pinball game or machine in his possession or in his custody or under his control.

Each of the several plaintiffs is the owner of a number of pinball machines, which are placed in business establishments under a contract whereby the owners and merchants divide the revenue derived from their operation.

Judge Gessaman of this court granted a temporary restraining order against the enforcement of the ordinance in question, and the case is now before the court to determine whether that order should be made permanent or dissolved.

There are a number of different kinds of pinball machines involved but the principle and method of operation are the same. By the deposit of a coin a player receives the right to make a certain number of plays, always the same number. The play consists in propelling the balls by means of a plunger operated by the player and the balls in passing over the face or surface of the machine, come in contact or may come in contact with various obstacles and contacts with certain of these obstacles result in the recording of a score.

The object of the play is to see how high a score can be made, but supposedly the play is for amusement only since, unless a machine is especially equipped to reward the player with a free play or plays, dependent upon the score made, or the owner or custodian awards prizes for certain scores, the player receives nothing other than the satisfaction derived from the score made which is largely dependent upon chance, but somewhat on the skill and experience of the player.

In times past pinball machines were in the main designed and used as gambling devices, players being rewarded with coins, tokens redeemable in merchandise, money, etc., dependent primarily on chance. Such machines or devices were violative of the State statutes prohibitive of gambling.

Revised Code Sections 2915.01 to 2915.17 are all statutes designed to prohibit gambling in Ohio. Section 2915.15 has specific application to gambling devices, and provides as follows:

> "No person shall keep or exhibit for gain or to win money or other property, a gambling table, or faro or

keno bank, or a gambling device or machine, other than as is defined in section 2915.10, 2915.12, and 2915.16 of the Revised Code, or keep or exhibit a billiard table for the purpose of gambling or allow it to be so used. Whoever violates this section shall be fined not less than fifty nor more than five hundred dollars and imprisonment not less than ten nor more than ninety days, and shall give security in the sum of five hundred dollars against further violation of this section for one year."

Section 2915.16 defines a gambling device as follows:

"(A) Any slot machine or any other machine or mechanical device, other than as is defined in sections 2915.10 and 2915.12 of the Revised Code, an essential part of which is a drum or reel with insignia thereon which when operated may deliver, as the result of an element of chance, any money, property, or other thing of value or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money, property, or other thing of value.

"(B) Any machine or mechanical device, other than as is defined in sections 2915.10 and 2915.12 of the Revised Code, designed and manufactured to operate by means of insertion of a coin, token, or similar object so that when operated it may deliver as the result of the application of an element of chance, any money, property, or other thing of value; * * *"

From the above statutory definition, it appears that the pinball machines here under consideration are not gambling devices since, when operated, they do not deliver as a result of chance any money, property or thing of value, nor may a person operating the same become entitled to receive as a result of chance any money or thing of value.

So far then, as the State statutes are concerned, these pinball machines are not violative of the law.

Back in 1936 the Police Department began to or threatened to confiscate all pinball machines and in the case of

Barok vs. City of Columbus, #148573, a permanent injunction was issued out of this court, prohibiting such confiscation, unless the machine or machines were actually being used for gambling.

In 1945 the Columbus City Council passed Ordinance 54-45 regulating pinball machines and providing that all such devices must be licensed by the city, and from that time until 1953 they were so operated under the regulatory and licensing provisions of that ordinance.

On March 19th, 1953, Council passed Ordinances Nos. 156-53 and 157-53. The purport of Sec. 156-53 is to provide for the seizure and destruction of any machine, device, instrument, apparatus or contrivance which tends to encourage gambling and may be used in a manner violative of the Code of the City of Columbus. Sec. 29-38 Ordinance 157-53 provides as follows:

> "It is hereby declared prejudicial to the public good, detrimental to the public morals and a nuisance, for any person to exhibit for the purpose of operating or to permit the operation of any machine, device or instrument in the City of Columbus, Ohio, of whatever kind or description, or by whatever name known or commonly referred to which tends to encourage gambling, or which registers odds or a score, or which is adapted, or may readily be converted into such machine, device or instrument that is adapted, for use in a manner violative of Sections 29.38-1, 29.40, 29.42, 29.42-1, and 29.42-2 of this chapter, and every machine so exhibited or permitted to be operated shall be subject to seizure, by any police officer of the city, and no such machine, device or instrument so seized by any police officer of the city, whether under the authority of this section or Section 29.39 or otherwise, shall be returned to the owner or person claiming the same except pursuant to an order of a court of competent jurisdiction."

Under these ordinances the City proposed to confiscate all pinball machines found in use in Columbus and suit was

brought in this court to enjoin such action, being the case of Ferguson et al. v. The City of Columbus, Case #187169.

The basis for the relief asked was similar to that in the instant case, namely that the ordinances were unconstitutional in that they (1) authorize seizure and confiscation of games without proof of their use for gambling purposes; (2) They impair the obligation of contract; (3) They take owners' property without due process of law; (4) are so vague, indefinite and uncertain as to constitute a denial of due process of law; (5) deny the owners equal protection of the law; and (6) constitute an unreasonable exercise of police power,—attempt to delegate judicial and/or legislative power.

All of these claims were denied in the answer, but a further allegation that the ordinances described amended former ordinances which permitted the registration and licensing of the games involved was admitted.

A temporary restraining order was granted and defendants filed an answer as above indicated, and then filed a motion for judgment on the pleadings, which motion was sustained by Judge Harter of this court.

On appeal to the Court of Appeals, this judgment was reversed on the grounds that the Court had erred in sustaining defendant's motion for judgment on the pleadings, in dissolving the temporary restraining order, and in entering final judgment in favor of defendants. The Court held that issues were raised by the pleadings which required a determination of facts by the Court from evidence addnced upon trial.

In commenting on Sec. 29.38 above quoted, the Court said:

> "This section permits the seizure of the machines if they register odds or a score without the qualifying language which is carried into the penalty section of Sec. 29-42-2. It also authorizes the seizure of the

machines if their operation 'tends to encourage gambling', another provision that is not carried into the other penalty provisions of the ordinances. The section further authorizes any police officer to make the seizure, that is to say, if a police officer determines that the machines 'tend to encourage gambling' he may seize them. This section of the ordinance not only sets out the essential requisites upon which seizure may be made, but incorporates the other sections of the ordinance and provides that if the machines come within any specific characterization of the section or are violative of any other named sections of the ordinances, they may be seized. * * * The provision for seizure, of Section 29-38 of the ordinance under consideration, is invoked upon the declaration that operations such as are therein defined, constitute a nuisance which may be abated. The City has wide police power in defining and declaring what shall constitute a nuisance. Insofar as the section authorizes seizure of machines that are gambling devices, per se, or operate in a manner described which is recognized as gambling, there is no doubt as to its validity, but:

'The mere declaration in an ordinance that is enacted to protect public safety, health or morals will not render it valid as being within the police power unless there is some reasonable relation between such purpose and the regulations prescribed,' —Youngstown vs. Kahn Bros., 112 O. S. 654.

* * * "The Legislature can prohibit only those uses of property which are hurtful to the public, and the inhibited use must be hurtful in a legal sense. * * * We do not hold that the ordinance is invalid because it characterizes as a nuisance the operation of a machine, therein described, 'which tends to encourage gambling'. It is the method of making determination of this essential of a nuisance as a basis of a seizure of the machine which we cannot support. There is no authority in statutory law for the seizure of the machines here under consideration upon the averments of the petition other than as an incident to conviction."

Thereafter to avoid the effect of this decision, Council passed Ordinance #1615.54, which, with the preamble, is as follows:

"To prohibit the possession of pin-ball and certain other similar machines; to supplement the Code of the City of Columbus, 1952, by the enactment of Section 29.69-1 thereof; and to declare an emergency.

Whereas, the operation of pin-ball machines and similar machines involving chance or skill or reward encourages gaming and the general disorder incident thereto, and is a threat or menace to the peace and morals of the community; and,

Whereas, even the so-called amusement-only pin-ball machines are so constructed as to be almost identical in appearance and operation to certain gambling devices, per se; and,

Whereas, even the vast majority of such so-called amusement-only devices are readily convertible to gambling devices; and,

Whereas, the operation of even amusement-only pin-ball machines has become and now constitutes a nuisance in that it encourages a false sense of values, idling, and loitering; and,

Whereas, an emergency exists in that such pin-ball machines are now generally absent from the city, but will return unless immediately prohibited; and for the immediate preservation of the public peace and safety; now, therefore,

Be it ordained by the council of the city of Columbus;

Section 1. That the Code of the City of Columbus, 1952, be and the same is hereby supplemented by the enactment of new Section 29.69-1 thereof, which said section shall read as follows:

'Section 29.69-1. Pinball machines, Prohibited. Whoever shall within the city have in his possession, or in his custody or under his control any table game or device commonly known as a "pin game," "pinball game," or "marble game," the operation, use or play of which is controlled by placing therein any coin, plate, disk, plug, key or other token, or by the payment of a fee, shall be guilty of a misdemeanor and

upon conviction shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.'

Sec. 2. That for the reasons stated in the preamble hereto, this ordinance is hereby declared to be an emergency measure and shall take effect and be in force from and after its passage and approval by the mayor.

Passed December 6, 1954. O. J. Fillinger, President of Council.

Approved December 7, 1954. M. E. Sensenbrenzer, Mayor.

Attest: Agnes Brown Cain, City Clerk."

This ordinance makes it unlawful to possess or operate any pinball machine, irrespective as to whether it is being used for gambling purposes. The theory apparently being that since players may gamble on the outcome of games played, or the owner or operator might award prizes resultant on certain scores, in order to avoid any such possibility no pinball machines will be allowed to be owned or operated.

The evidence in this case fails to show that the operation of pinball machines for amusement only encourages gaming or disorder or is inimical to the peace and morals of the community. While it is true that the appearance generally of the pinball machines under consideration is similar to those used for gambling, the similarity stops with the appearance.

The essential difference is that they are not equipped or intended to be used as gambling devices, in that each player receives the same number of chances to play for a given deposit, and no one receives or is entitled to receive anything other than amusement or pleasure as the result of his play. They are not readily convertible to gambling devices, but such a change entails the services of a skilled

mechanic for an appreciable time, and all the evidence as to the machines in question is that they are not to be so converted.

The evidence fails to support the claim that the operation of these strictly amusement machines constitutes a nuisance, or that an emergency existed by reason of their operation or expected operation, and the conclusions set out in the preamble of the ordinance are not supported by the facts adduced in this case.

That pinball machines designed for gambling and used for that purpose have been rather common, in the past, did encourage gambling and constituted a nuisance, there can be little doubt, nor can there be any question but that either under city ordinances or state statutes such use may be and is prohibited. The question then remains as to whether the City has the authority to prohibit by ordinance the use and operations of pinball machines which are merely designed and utilized for amusement purposes.

Among the cases cited by defendants are two Georgia cases, one of which is Baker v. LaFayette, 44 S. E. 2nd, 255, in which a city ordinance was involved which in part reads as follows:

> "Section One. That from and after the 10th day of January, 1942, it shall be unlawful for any person, firm or corporation, to own, maintain, or operate any pinball machine, or similar machine, including all machines operated by depositing a coin therein for the playing of a game or engaging on any contest of chance or skill, including vending machines where the amount of merchandise to which the customer or person playing the machine is entitled, is uncertain, or may in some instances be a larger amount than in other instances."

The Court held that:

> "Pinball machines operated solely for pleasure * * * were within ordinance prohibiting ownership and

operation of pin ball machines operated by depositing a coin for playing a game or engaging in any contest of chance or skill."

In that case, however, the decision seems to have been decided on the basis of the authority contained in the Charter granted to the City of LaFayette, Section 29 of which was referred to in the decision as follows:

"Section 29 of the Charter of the City of LaFayette conferred authority upon the mayor and council to license, regulate and control * * * every keeper of a shooting gallery, nine pin, or ten pin alley, upon the keeper of any other table, stand or place for the performance of any game or play whether played with stick or ball, ring or other contrivance * * * and upon all establishments, business callings or avocations not hereinbefore mentioned, and which under the laws and constitution of the State of Georgia are subject to license."

In the opinion the Court said that:

"Under the Charter of the City of LaFayette, the mayor and council had authority to pass the ordinance in question."

The decision is short, the Court evidently concluding that the authority to control was authority to prohibit without any discussion on that point.

To the same effect is the case of Wallace v. Cartersville, 453 S. E. 2nd 63, which is another Georgia case and decided by the same Court, the first syllabus of which is as follows:

"Municipalities have authority under their charters to pass local ordinances prohibiting operation and maintenance of pinball machines within their corporate limits."

In the case of Ex parte Lawrence, 131 Pac. 2nd, 27, an ordinance of the City of Long Beach was involved, in which the Court held the ordinance "prohibiting maintenance and possession of pin games and other named games

in places of business or other places of public resort * * * is not "prohibitory" but "regulatory" only, and hence within the scope and purview of "police power".

In its opinion the Court said:

> "In the case now before us regulation, not prohibition is decreed by the ordinance. The games are proscribed only in places of business, or in any other 'place of public resort,' and exception is made of the amusement games described in another Long Beach ordinance. In other words 'pin ball' and other games denominated in the ordinance may be maintained at private houses or in certain delineated amusement zones, but not generally in places of business or public resort. The ordinance is not prohibitory, but regulatory only, and as such is unquestionably within the scope and purview of the police power."

To the same effect is the case of Sharpe v. Johnson, 185 Pac. 2nd, 340, in which the ordinance of the City of Laguna Beach involved prohibited maintenance of any table game, marble game or similar device in places of business or other public resort, and the Court again held that such ordinance was regulatory only and not prohibitory.

From a reading of these California decisions, one is impressed with the conclusion that had the ordinances been absolutely prohibitory, as the Columbus ordinance is, a different result would probably have been reached.

In the case of Kitt v. Chicago, 112 N. E. 2nd, 667, involved the question as to whether a certain game came within the meaning of a City Ordinance enacted pursuant to an enabling statute which granted authority to municipalities "To license, tax, regulate or prohibit pinball, or bowling alleys, billiard, bagatelle, pigeonhole, pool, or any other tables or implements kept for a similar purpose in any place of public resort."

Pursuant to this authority the Chicago City Council adopted an ordinance prohibiting bagatelle and pigeon-hole, and defined the meaning of those terms.

The Court simply held that an electric bowling game was not included within the definition of the proscribed games, and since the ordinance was restricted to those two games, the operation of an electric bowling game was not a violation of the ordinance.

In the case of Green v. Fifth Inning Base Ball Machine, 3 So. 2nd, 27, the Supreme Court of Alabama had under consideration a statute for the suppression of gambling devices and the Court held that the device called a fifth inning baseball machine, which was operated by placing a nickel in slots, which released certain balls and by ejecting balls on board by pulling a plunger and striking against the balls, which would then strike projections or bumpers on the board, a higher score resulting by striking certain numbers than by striking others, was a "game of chance" subject to condemnation as a "gambling device" under codal provisions relating to suppression of gambling devices, and thus whether the devices are used for gambling or players are offered inducement by way of prizes or other rewards. Among other things the Court said:

> "We think it clear enough from the language of this act, especially definition (d), that the law making body deemed it necessary to prohibit all such machines and devices which could be operated as a game of chance, regardless as to whether there was a 'pay off' or not, in order to fully repress the gambling evil. That this was within the police power of the state and violated no provision of the constitution, either State or Federal, is well demonstrated in the Eccles case, supra, as well as in our own case of State v. Murphy, 237 Ala. 332."

As before stated, this case involved a state statute which might well have more force and effect than a City Ordinance. The Court discussed a case in Arkansas as follows:

> "The Arkansas court in Stanley v. State, 194 Ark. 483, had for consideration this same character of machine, and the holding was that it was 'susceptible to use as a gambling device' and came within the condemnation of the statute. See also Steed v. State, 189 Ark. 389, where the observation was that such machines are gambling devices 'because the only reasonable and profitable use to which they may be put is use in a game of chance."

This observation is directly contrary to the evidence in this case which was that the use of the machines purely for amusement was quite profitable.

This decision is not helpful here in view of the statutory definition of a gambling device in this state which has heretofore been quoted.

In the case of Westerhaus Co. v. Cincinnati, 68 Abs. 293, there was under consideration a city ordinance which provided as follows:

> "It shall be unlawful for an exhibitor or other person to exhibit, operate or have in his possession a pinball machine which is so constructed as to make possible, either directly, or by use of an adjustment, the return of cash, tickets, discs or other tokens or certificates of any kind to a player operating the same, whether or not such tokens or certificates have a value of any kind or authorize further playing or other privileges. Only machines operated exclusively for the amusement provided by the operation shall be licensed."

The effect of the decision in that case was that possession or operation of a pinball machine was not a violation of the ordinance unless actually used for gambling purposes and the provision in the ordinance as to the possibility of use for gambling was not discussed.

In his opinion overruling defendants' demurrer to the petition, Judge Gessaman quoted from the case Frecker vs. Dayton, 88 O. A. 53, the third syllabus of which is as follows:

> "The police power granted to municipalities under Sec. 3, Article XVIII of the Ohio Constitution includes the power to 'regulate' but not the power to 'prohibit'. 'Regulation' does not include 'prohibition', unless the object of the legislative regulation is an inherently evil occupation, trade or business.
>
> "* * * Whether the machines in question are or create an inherently evil occupation, trade or business, cannot be determined on demurrer. It is a factual question which will be controlled by the evidence."

If used as gambling devices these machines or any machines would create an inherently evil trade or business, but used solely for amusement, which is the effect of the evidence in this case, it is difficult to conclude that they constitute a nuisance or create an inherently evil business.

The ordinances in question being absolutely prohibitory are beyond the authority of council to enact. As drawn the ordinances, if valid, would preclude the possession of a pinball machine in a private home, solely for the amusement of the owner, his family and friends, and this Court is of the opinion that council has no authority to enact such prohibitory legislation.

It might be suggested that the evil consequence on the use of pinball machines for amusement, if such evil exists, could easily be corrected by patterning an ordinance after those of Long Beach and Laguna Beach in which possession and operation in business or public places be prohibited. This, as pointed out in the California cases, would be "regulation" and not "prohibition" as provided in the present ordinances.

Concluding then that the ordinances under consideration are prohibitory rather than regulatory, and therefore be-

yond the power of council under the constitution to enact, the motion to dissolve the restraining order is overruled and the order made permanent. An entry may be prepared accordingly.

APPENDIX C

No. 5529—Ray M. Benjamin, et al., Appellees, v. City of Columbus, et al., Appellants.

No. 5530—G. D. Ferguson, et al., Appellees, v. City of Columbus, et al., Appellants.

Opinion of the Court of Appeals

(Rendered on February 7, 1957.)

Fess, J., of the Sixth District, sitting by designation.

Appeals on questions of law and fact from a judgment entered in Ferguson v. Columbus, #187,169 in the Common Pleas Court, permanently enjoining the defendant from the enforcement of Ordinances numbered 156-53, 157-53 and 1615-54. Benjamin v. Columbus, #191,975, was consolidated with the Ferguson case in the trial court and upon the appeals, the two cases are consolidated herein for retrial. The Ferguson case attacks the constitutionality of Ordinances 156-53 and 157-53, whereas the Benjamin cases relates to Ordinance 1615-54. By stipulation, it is agreed that each action includes the three Ordinances in question.

A digest of the averments of the petition as well as the salient provisions of the 1953 ordinances are reported in Ferguson v. Columbus, 70 Abs., 277, and are not repeated herein. The answer in the Ferguson case admits that the city threatened to enforce the provisions of the ordinances against plaintiffs and merchants with whom plaintiffs have contracts.

On July 19, 1954, the Common Pleas Court, based upon a well-considered opinion, in which it concluded that the 1953 ordinances were not violative of constitutional provisions, entered judgment for the defendant upon the pleadings. Upon an appeal on questions of law, this judgment was reversed, essentially on the ground that issues of fact were presented upon the pleadings that required a trial. Ferguson v. Columbus, 70 Abs., 277. In its opinion, the Court of Appeals made certain suggestions with respect to the licensing and seizure provisions of the 1953 ordinances, which are carried in the headnotes of its opinion.[1]

In its opinion, the Court of Appeals concludes "that the ordinances, given full force and effect, if the averments of the petition are proven, do not authorize, nor purport to empower, the defendant officers with the right to confiscate the machines, or to arrest and imprison the merchants with whom plaintiffs have contracts". The court also says that "it is not necessary to decide the issues of the constitutionality of the ordinances except in so far as is required to determine if, upon any theory, the sustaining of the motion for judgment on the pleadings was proper", and that "we do not hold the ordinance is invalid because it characterizes as a nuisance the operation of a machine therein described 'which tends to encourage gambling'. It is the method of making determination of this essential of a nuisance as a basis of a seizure of the machine which we cannot support".

After the Court of Appeals decision in the Ferguson case was announced, the defendant, no doubt as a result of such decision, enacted Ordinance 1615-54 on December 7, 1954. This ordinance provides that whoever shall have in

[1] We are advised that the headnotes of the opinion of the Second District Court of Appeals appearing in the Ohio Law Abstract were neither prepared nor approved by the Court.

his possession, custody or control any table game or device commonly known as "pin game", "pin-ball game" or "marble game", the operation, use or play of which is controlled by placing therein any coin, plate, disk, plug, key or other token, or by the payment of a fee, shall be guilty of a misdemeanor, etc. The purpose of this supplementary ordinance is rather ineptly stated in the preamble.[2]

These ordinances tacked onto the chapter of the Columbus Code relating to gambling, are complex, contradictory, and bear the mark of having been hastily drawn and considered without that degree of care and clarity of expression which should attend legislative enactments. We concur in the suggestions made in the Ferguson case, 70 Abs., at p. 288, that the ordinances should be shortened and codified into simple, concise and clear phraseology.

In March, 1955, the Benjamin case was filed, attacking the 1954 ordinance. On May 9, 1956, the Common Pleas Court found that a municipality has no authority to prohibit the use and operation of pinball machines which are merely designed and utilized for amusement purposes only. 73 Abs., 143. A decree was entered permanently enjoining the defendant from interfering with the ownership, etc.,

---

(2) "Whereas, the operation of pinball machines and similar machines involving chance or skill or reward encourages gaming and the general disorder incident thereto, and is a threat or menace to the peace and morals of the community, and

Whereas, even the so-called amusement-only pinball machines are so constructed as to be almost identical in appearance and operation to certain gambling devices per se; and

Whereas, even the vast majority of such so-called amusement-only devices are readily convertible to gambling devices; and

Whereas, the operation of even amusement-only pinball machines has become and now constitutes a nuisance in that it encourages a false sense of values, idling, and loitering; and

Whereas, an emergency exists in that such pinball machines are now generally absent from the city, but will return unless immediately prohibited; and for the immediate preservation of the public peace and safety; now, therefore:" etc.

of pin games by the plaintiffs and any merchant with whom plaintiffs have contracts for the operation of such games so long as they are not used for gambling.[3]

A century ago an eminent jurist declared that an application for injunction is addressed to the sound discretion of the court. Spencer, J., in Commercial Bank v. Bowman (1855), 1 Handy, 246. This discretion reposed in a court of equity is to be exercised in the light of all circumstances surrounding the application for relief by way of the injunctive process.

The council of Columbus, in the exercise of its legislative function pursuant to its inherent police power and as conferred upon it by the Ohio Constitution, has declared that pin games (not gaming devices per se) are detrimental to public morals in that they tend to encourage gambling, register odds or a score, or are adapted, or may be readily converted into a machine, device or instrument that is adapted for use in violation of other provisions of the chapter relating to gambling.[4]

The ordinance also characterizes the operation of such a machine a nuisance. We are aware that the Supreme Court of Ohio has said that the mere declaration in an ordinance that it is enacted to protect public safety, health or morals will not render it valid under the police powers. Youngstown v. Kahn Bros. Bldg Co., 112 Ohio St., 654. And if a municipal ordinance has no reasonable relation to the morals, health and safety of the people of a municipality, it is an unauthorized exercise of the police power. Youngstown v. Kahn Bros., etc., supra; 37 Amer. Juris., 927.

But the ordinances in the instant case not only contain a general declaration that pin games are detrimental to

---

[3] Although Westerhaus Co., Inc., v. Cincinnati, 165 Ohio St., 327, was not announced until June 11, 1956, free-play machines are excluded from the injunction.

[4] See 70 Abs., p. 284, wherein #29.38 is quoted in full.

public morals, but also the specific grounds which in the opinion of the legislative body makes such games detrimental. Council may have recognized the ancient adages that "a foles bolt is soone shotte", (Taverner, 1539) and "a fool and his money is soon parted", (Howell, 1645). Council in its wisdom may have concluded that mechanical whirr accompanied by the glitter of the flickering lights engendered by the erratic peregrination of the metallic balls recording mounting scores appeal to the gambling instinct and cupidity of the "moronic wastrels" who may play the machines for amusement only. Council has concluded that there are devices in addition to "one-arm bandits" which entice the gullible to gleefully fiddle away their time and substance in parting with their nickels and dimes.

An ordinance of a municipality can not be overthrown by a court unless such legislation is clearly arbitrary, unreasonable or unrelated to the public health, morals, safety, or welfare of the community. It is not for the courts to determine the wisdom of the legislation, but its constitutional validity, and a court may not substitute its judgment for that of the legislative body as to the necessity for or wisdom of the legislation. Stary v. Brooklyn, 162 Ohio St., 120, 134. Furthermore, a court will not substitute its judgment for the discretion of municipal legislative authorities, who are presumed to be familiar with the local needs and conditions, so long as the provisions do not clearly transcend the limits of reasonableness. 28 Ohio Juris., 498.[5]

---

[5] "The proposition is well established that ordinances of a municipality must not be unreasonable or arbitrary; but it is equally well-settled that courts should not substitute their judgment for the legislative discretion and do not pass upon the wisdom or expediency of an ordinance." Dayton v. Kreske Co., 114 O. S., 624, 629, citing Allion v. Toledo, 99 O. S., 416.

Over objection, parties plaintiff engaged in the leasing of pin games, testified that their non-free play machines were operated for amusement only and did not tend to encourage gambling or loitering. This opinion evidence, given by witnesses interested in the outcome of the litigation, does not meet, much less overcome, the legislative declaration, presumptively true, that such machines tend to encourage gambling and loitering. These interested witnesses also testified that it would take up to four or five days for an expert mechanic to convert a machine to free play.[6]

There is also evidence that the conversion can be made in a much shorter period. But, accepting the exaggerated period at face value, we cannot hold that the council was wrong in declaring that such machines are readily convertible. A presumption of legality and good faith attends the adoption of an ordinance until it be clearly established that the council has exceeded its powers, or that it acted in bad faith, or has abused its discretion. 28 Ohio Juris. 501. Although we might agree with the opinion expressed by the operators and disagree with that of the council, we may not substitute our opinion for that of the legislative body.

Incident to obtaining the relief herein sought, the plaintiffs are also confronted with another insurmountable presumption. The cardinal rule in the interpretation of ordinances is to ascertain, declare and give effect to the legislative intent, which is to be gathered from the provisions of the enactment and the apparent purpose of the

[6] It is of some significance that these witnesses were unfamiliar with the interior mechanism of the machines and that the plaintiffs did not elect to introduce the testimony of expert mechanics who must have been available, regarding the manner of conversion and the time and skill required.

law as applied to the evil at which it is aimed. Toledo v. Wagner, 57 Ohio App., 160. It is repeatedly held in Ohio that a clear incompatibility between a law and the Constitution must exist before the judiciary is justified in holding the law unconstitutional, and the party asserting unconstitutionality must clearly show it. 10 Ohio Juris. 2nd, p. 248. A legislative function will not be interfered with by the courts unless such power is exercised in an arbitrary or unreasonable manner in violation of constitutional guaranties, and the facts to justify interference with the sound discretion of the legislative body must clearly appear from the evidence, and, if debatable, the legislation will be upheld. Cleveland Trust Co. v. Brooklyn, 92 Ohio App., 351.

Plaintiffs seek to draw a distinction between the power of a municipality to "prohibit" and its power to "regulate", as provided in #3, Art. XVIII of the Constitution. They apparently concede that the power to regulate includes the power to prohibit that which is inherently evil, but contend that the power to regulate does not include the power to prohibit that which is not inherently evil or is legitimate. 10 Ohio Juris. 2nd, 506. If a business is not harmful, the prosecution of it can not be lawfully prohibited to one who will conduct such business in a lawful manner. Thus it has been held that the following businesses do not bear such a relation to the public health, welfare, safety, or morals as to justify their restrictive regulation: commercial photographing, selling flowers, watchmaking, and painting, paperhanging, plastering and mason work (10 Ohio Juris. 2nd, 504); also slaughtering of chickens (Simon v. Cleveland Heights, 46 Ohio App., 234); street sales of ice cream, soft drinks, candies, etc. (Frecker v. Dayton, 153 Ohio St., 14; Frecker v. Zanesville (CP) 35 O. Ops. 234; Schul v. King (CP) 35 O. Ops.

238); trafficking in amusement tickets (Heller v. Cleveland (CP) 25 O. Ops. 106); and weighing and measuring (Cincinnati v. Broadwell, 3 O. Dec. Repr. 286). Cf. 10 Ohio Juris. 2nd, 507. But these authorities do not go to the extent of holding that a municipality may not prohibit that which has evil potentialities, such as is declared under the ordinances in question. Cf. Myers v. Cincinnati, 128 Ohio St., 235, 238.[7]

Furthermore, that which is legitimate may be prohibited incidental to the regulation of an evil. For example: ninety-nine percent of uninspected meat may be perfectly wholesome and its sale legitimate, but in the interest of protecting the consuming public from the one percent which may be unwholesome and deleterious, the sale of wholesome uninspected meat may be prohibited. Dayton v. Jacobs, 120 Ohio St., 225; Cf. Cleveland v. Terrill, 149 Ohio St., 532; Grown v. Cleveland, 125 Ohio St., 455 (sale of corn sugar). As stated in the Grown case, drastic regulations of private business have been repeatedly held to be constitutional, citing Marmet v. State, 45 Ohio St., 63; Phillips v. State, 77 Ohio St., 214; Sanning v. Cincinnati, 81 Ohio St., 142;

---

(7) "The constitutional provisions relied upon by plaintiff in error protect the citizen in his right to pursue any lawful business, but they do not prohibit legislation intended to control pursuits which because of their nature have injurious and harmful possibilities. Even if the slot machine involved in this case is manufactured and intended for lawful operation, its potentiality and design is such that it may be easily put to lawful use. The regulation or prohibition of such a mechanism need not be postponed until such event occurs."

"The city has the right to determine whether the exhibition, maintenance and operation of slot machines as defined in the ordinance are prejudicial to the public good." Myers v. Cincinnati, supra.

As in the instant case, the defendant contended that the particular slot machine was for amusement only. The statement of facts indicates that the machine was used for gambling but the import of the decision is that even though it be used for amusement only, the city could prohibit it on account of its potentiality. (End of footnote)

Renner Brewing Co. v. Rolland, 96 Ohio St., 432; State v. Norval Hotel Co., 103 Ohio St., 361; Holsman v. Thomas, 112 Ohio St., 397; Dunn v. State, 122 Ohio St., 431. See also dissenting opinion of Tatt, J., in Frecker v. Dayton, 153 Ohio St., 14, 23. It is readily observed that incident to the exercise of the power to regulate, otherwise legitimate activities which do not comply with the regulations may be prohibited.

There is a clear cut distinction between that class of articles which have been declared unlawful and a public nuisance by statute or by ordinance and may be seized and disposed of forthwith and the class of property which is lawful in its ordinary and proper use and becomes contraband only when used in an unlawful manner and where there is determination to that effect in a court of competent jurisdiction. Grieb v. Dept. of Liquor Control, 153 Ohio St., 77, 81, citing Wagner v. Upshur, 95 Md. 519, 52 A. 509; Edson v. Crangle, 62 Ohio St., 49, 56 N. E. 647; State v. French, 71 Ohio St., 186, 202, 73 N. E. 216; In re Estate of Weisenberg, 147 Ohio St., 152, 70 N. E. 2nd, 269. There is likewise a distinction between a pin-ball game which has been declared unlawful and a nuisance and the so-called "fish net" cases referred to in the Grieb case.

Notwithstanding the constitutional safeguard of religious freedom, conduct of business pursuits, including sports, may be validly prohibited on Sunday.[8]

Since regulation, as the term is used in the Constitution, includes prohibition, in order to grant relief we must find

---

[8] "The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted. The legislature has so considered it, and the judiciary cannot say that the legislature was mistaken, and, therefore, the act is unconstitutional, without passing out of its legitimate sphere, and assuming a right to supervise the exercise of legislative discretion in matters of mere expediency." State v. Powell, 58 Ohio St., 324, 345.

that the prohibitory regulation herein involved has no reasonable relationship to the public morals or public welfare. It is to be borne in mind that the burden is not upon the city to sustain the constitutionality, but the burden is on the plaintiff to clearly show that enactments are unconstitutional. It is our conclusion that the plaintiffs have failed to show that such prohibitory regulations are unreasonable and arbitrary or that they have no real or substantial relation to the morals or general welfare of the people of Columbus.

In its opinion in Ferguson v. Columbus (1954), 70 Abs., 277, the court, without being required to do so, said that the power granted in the 1953 ordinance to police officers and licensing officials to determine that the operation of a pinball machine "tends to encourage" gambling is too broad and is a judicial power which cannot be delegated to enforcing or licensing officials. In our opinion this invalidity has now been removed by the enactment of Ordinance 1615-54, prescribing a standard for licensing and seizure of pinball machines, which the council has declared tend to encourage gambling, register odds or scores, and are readily convertible to free play. Admittedly this conclusion is debatable, but the doubt must be resolved in favor of constitutional validity. As a general rule, a law which confers discretion on an executive officer or board, without establishing any standards for guidance, is a delegation of legislative power and unconstitutional; but when the discretion to be exercised relates to a police regulation for the protection of the public morals, welfare, safety or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished, the legislation conferring such jurisdiction may be valid and constitutional without such restrictions

or limitations. 7th Par. Syllabus in Matx v. Curtis Cartage Co., 132 O. S., 271.

In the light of the foregoing observations, the ordinances are not in violation of the Fourteenth Amendment. Murphy v. California, 225 U. S., 623.

In conclusion, plaintiffs in each case have failed to show:

1. A clear incompatibility between the ordinances and the Ohio Constitution.

2. That the ordinances bear no real and substantial relation to the public health, safety, morals or general welfare of the public, or are arbitrary or unreasonable.

3. That plaintiffs are entitled to injunctive relief.

The petition in each case should be dismissed at plaintiff's costs. Judgment for defendant in each case and causes remanded to the Common Pleas Court for execution for costs. See journal entry to be submitted to Hunsicker, P. J., for approval.

Deeds, J., of the Sixth District, and Hunsicker, J., of the Ninth District, sitting by designation, concur.

APPENDIX D

Opinion of the Supreme Court of Ohio

No. 35179—Ray M. Benjamin, et al., v. City of Columbus, et al.

No. 35180—G. D. Ferguson, et al., v. City of Columbus, et al.

Decided December 18, 1957

1. Where all the proposed uses of certain pin-game machines by their owners will necessarily violate the law as set forth in valid municipal ordinances, the petitions of such owners seeking equitable relief to protect those machines and seeking declaratory judgments setting forth their rights and duties with respect to them will be dis-

missed. (Paragraph four of the syllabus of Westerhaus v. City of Cincinnati, 165 Ohio St., 327, approved and followed.)

2. The "powers of local self-government" conferred upon municipalities by Section 3 of Article XVIII of the Constitution include the power to enact local legislation, except to the extent that limitations upon that legislative power have been set forth in the Constitution.

3. The words appearing in Section 3 of Article XVIII of the Constitution after the word "self-government" represent not a grant of legislative power but a limitation upon the legislative power granted by the words up to and including the word "self-government."

4. A municipal ordinance enacted pursuant to the police power of the municipality cannot be considered invalid merely because it prohibits instead of regulates. (Frecker v. City of Dayton, 153 Ohio St., 14, distinguished.)

5. Although almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section 1 of Article I of the Ohio Constitution, or involve an injury to a person within the meaning of Section 16 of Article I of that Constitution, or deprive a person of property within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States, an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.

6. Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are com

mitted in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them.

7. Where an amusement device is so designed that it may readily be put to an unlawful use in gambling, a municipality may, in the exercise of its police power, prohibit the exhibition of such machine and need not postpone such action until such machine is unlawfully used. (Myers v. City of Cincinnati, 128 Ohio St., 235, followed.)

8. A machine or other device is not a game within the ordinary meaning of the word "game" if it does not enable someone to determine whether he has, by his efforts in playing it, either made some score or achieved or not achieved some other objective.

9. A municipality may by ordinance make it a misdemeanor to possess within the municipality any pin game, the operation, use or play of which is controlled by placing therein any coin, although operation of such machine will not give a player any prize even by way of free plays or anything in return for his payment other than amusement in playing such game.

10. The provisions of the state and federal Constitutions, inhibiting laws impairing the obligation of contract, cannot affect the police power.

11. If the police power of a municipality includes the power to make possession within the municipality of a certain kind of property unlawful, the exercise of that police power to make such possession unlawful will not be impaired by the fact that owners of such property have theretofore made binding contracts relative to its use within the municipality.

These two actions for declaratory judgment and injunction were heard together by the Common Pleas Court of

Franklin County under a stipulation that any evidence competent in one case should be competent in the other, and that the validity of three ordinances of the city of Columbus should be treated as being involved in each case. The plaintiffs in both cases, herein referred to as plaintiffs, have for varying numbers of years owned and operated in Columbus varying numbers of pin-game machines having very substantial values.

The three ordinances, the validity of which are questioned and which are now incorporated in the Code of the City of Columbus, are ordinance No. 156-53, relative to licensing of mechanical amusement devices but containing some provisions relative to seizure of machines tending to encourage gambling, ordinance No. 157-53, relative to gambling but containing some provisions declaring as a nuisance the exhibition for the purpose of operation of machines merely tending to encourage gambling and authorizing their seizure, and ordinance No. 1615-54 which reads so far as pertinent:

"Section 29.69-1. * * * Whoever shall within the city have in his possession, or in his custody or under his control any table game or device commonly known as a 'pin game,' 'pin-ball game,' or 'marble game,' the operation, use or play of which is controlled by placing therein any coin, plate, disk, plug, key or other token, or by the payment of a fee, shall be guilty of a misdemeanor * * *."

In the preamble to the ordinance enacting that section of the Code of the City of Columbus, it is stated in part:

"Whereas, the operation of pin-ball machines and similar machines involving chance or skill or reward encourages gaming and the general disorder incident thereto, and is a threat or menace to the peace and morals of the community; and,

"Whereas, even the so-called amusement-only pin-ball machines are so constructed as to be almost identical in appearance and operation to certain gambling devices, per se; and

"Whereas, even the vast majority of such so-called amusement-only devices are readily convertible to gambling devices; and,

"Whereas, the operation of even amusement-only pin-ball machines has become and now constitutes a nuisance in that it encourages a false sens of values, idling, and loitering * * *".

This latter ordinance was enacted in December 1954, immediately after the Court of Appeals in Ferguson v. City of Columbus, 70 Ohio Law Abs., 277, 128 N. E. (2d), 198, had cast doubt upon the effectiveness of the two earlier ordinances in discouraging the ownership or exhibition of machines which, although not gambling devices per se or shown to have been used for gambling, were adapted for gambling, might readily be converted to be so adapted, or registered odds or a score.

The Common Pleas Court determined that all these ordinances are "invalid, unconstitutional and void, insofar as they prohibit the ownership, possession, custody, control and operation of pin games for amusement purposes only" and decreed that defendants should be enjoined from interfering under these ordinances "with the ownership, possession, custody, control and operation of said pin games by * * * plaintiffs * * * as well as interfering with or molesting any merchant with whom said plaintiffs have either heretofore had, or may now or hereafter have, contracts for the operation of said games, so long as said games are not used for gambling." Benjamin v. City of Columbus, 73 Ohio Law Abs., 143, 136 N. E. (2d), 641.

On appeal to the Court of Appeals on questions of law and fact, that court determined that the three ordinances are valid and that plaintiffs are "not entitled to an injunction restraining the enforcement of said ordinances" and dismissed the petitions.

These two causes are now before this court on appeal from the judgments of the Court of Appeals, both as appeals involving constitutional questions and pursuant to allowances of motions to certify the records.

Opinion

Taft, Judge:

In order to avoid the effect of this court's decision in Westerhaus v. City of Cincinnati, 165 Ohio St., 327, 135 N. E. (2d), 318, plaintiffs have emphasized the fact that the machines involved in the instant case are not equipped so as to provide for and are not to be used to provide free plays. However, besides deciding that free-play machines are gambling devices, we also decided in the Westerhaus case that, since the proposed use of the machines there involved would violate certain state statutes, a petition of the owner of the machines "seeking equitable relief to protect such machines and seeking a declaratory judgment setting forth the rights and duties of such owner with respect to such machines, will be dismissed." (Paragraph four of syllabus.) In the opinion at page 335, it was pointed out that "if * * * each of the * * * machines * * * is * * * a 'gambling device or machine,' then the" trial court "would have been encouraging violations of" the law "if it had given plaintiff any relief with regard to those machines, and its judgment in dismissing the petition must be affirmed." If all the proposed uses by plaintiffs of the machines involved in the instant cases will necessarily violate the law, then their petitions, seeking equitable re-

lief to protect those machines and seeking declaratory judgments setting forth their rights and duties with respect to such machines, should be dismissed. Even though the law violated may be set forth in municipal ordinances instead of in state statutes, the same principle must be applied.

As we view it therefore we are confronted at the outset with the question whether the proposed uses by plaintiffs of the machines involved in the instant cases will necessarily violate any valid provisions of the ordinances of Columbus.

We agree with the Court of Appeals that these ordinances appear to have "been hastily drawn and considered without that degree of care and clarity of expression which should attend legislative enactments." However, although complaint is made with respect to the vagueness, indefiniteness and uncertainty of some parts of these three ordinances, no such complaint is made with regard to the provisions of section 29.69-1, hereinafter referred to as the 1954 ordinance, which makes it a *misdemeanor to possess within the city or to control a "pin game* * * *" the operation, use or play of which is *controlled by placing therein any coin.*" The allegations of plaintiffs' petitions either are or necessarily indicate that plaintiffs' business is the ownership, exhibition and rental to others for exhibition and use *in Columbus* of just such pin games. It is apparent therefore that plaintiffs neither contemplate nor suggest any possession in Columbus by anyone of the machines involved in the instant cases that will not necessarily amount to what is specified as a misdemeanor by that ordinance. Hence, unless plaintiffs can establish the invalidity of that ordinance, their petitions must be dismissed.

Plaintiffs argue that, since the pin-game machines in the instant cases are to be used for amusement only, their

operation constitutes a legitimate business; and that such a business cannot be prohibited. Such an argument, in effect, begs the question. Obviously, to the extent that acts in carrying on a business do not violate valid prohibitions of statutes and ordinances, it is a legitimate and lawful business. To the extent that those acts do violate such prohibitions, the business is neither legitimate nor lawful. If the carrying on of that business involves the doing of acts which are prohibited by the 1954 ordinance, then it is necessary to determine whether that ordinance is valid. It is not helpful, in determining that question, to jump to the conclusion that there is a right to do such acts and that, therefore, the ordinance prohibiting the doing of them is invalid.

Plaintiffs argue in effect that, although Columbus may have power to make regulations with respect to pin-game machines, it has no power to prohibit them.

Columbus contends that its power to enact the 1954 ordinance is derived from the provisions of Section 3 of Article XVIII of the Constitution, and plaintiffs contend that any such power can only be derived therefrom. That section reads:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The "powers of local self-government" conferred upon municipalities by this constitutional provision include the power to enact local legislation, except to the extent that limitations upon that legislative power have been set forth in the Constitution. Obviously, one such limitation is that any "police, sanitary and other similar regulations" that are adopted may be enforced only "within" the munici-

pality's limits and cannot "conflict with general laws." However, the words appearing in Section 3 of Article XVIII of the Constitution after the word "self-government" represent not a grant of legislative power but a limitation on the legislative power granted by the words up to and including the word "self-government." Hence, if the state would have power to prohibit what the 1954 ordinance purports to prohibit within the limits of Columbus, then that ordinance cannot be considered invalid merely because it prohibits instead of regulates.

We recognize that the Court of Appeals for Montgomery County apparently based its decision in Frecker v. City of Dayton, 88 Ohio App., 52, 85 N. E. (2d), 419, upon the conclusion that the police power granted to municipalities by Section 3 of Article XVIII of the Constitution includes the power to regulate but not the power to prohibit. That conclusion was apparently based upon the premise that the police power of a municipality or its power to enact police reguations is derived from the portion of that constitutional provision appearing after the word "self-government." As hereinbefore pointed out that premise is incorrect. It may be observed that, although this court affirmed the judgment of the Court of Appeals in the Frecker case (153 Ohio St., 14, 90 N. E. (2d), 851), the majority opinion, in giving reasons for the affirmance, apparently did not approve the conclusion, expressed by the Court of Appeals, that the police power granted to municipalities includes only the power to regulate and not the power to prohibit; and the minority opinion expressly rejected that particular conclusion of the Court of Appeals, thereby at least indicating that this court unanimously failed to approve any such conclusion when it was urged to approve it.

The case of Bronson v. Oberlin, 41 Ohio St., 476, 53 Am. Rep., 90, relied upon by plaintiffs, was decided long before

adoption of Section 3 of Article XVIII of the Constitution and at a time when municipalities derived any legislative powers they might have from enactments of the General Assembly. Its distinction from the instant case is well demonstrated by the following language of the opinion by Nash, J., at page 482:

"Whether the Legislature could confer the power to prohibit * * * or whether the council by ordinance could prohibit what this power conferred, are questions not involved in this case. The question simply is, 'What power did this act confer?' We are of the opinion that it did not give authority to prohibit."

The case of Weber v. Board of Health, 148 Ohio St., 389, 74 N. E. (2d), 331, relied upon by plaintiffs, actually tends to support the conclusion that legislative power may include the power to prohibit a business not unlawful in itself. Thus it is said in paragraph three of the syllabus:

"* * * when such board (of health) passes a resolution which prohibits a business not unlawful in itself and which is susceptible to regulations * * * such board transcends its administrative rule-making power and exercises legislative functions * * *."

Plaintiffs argue that the 1954 ordinance is arbitrary and unreasonable and that it takes plaintiffs' property without due process of law.

Almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section 1 of Article I of the Ohio Constitution, or involve an injury to a person within the meaning of Section 16 of Article I of that Constitution, or deprive a person of property within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States. Nevertheless, it is well settled

that an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary. City of Piqua v. Zimmerlin, 35 Ohio St., 507, 511.

Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them. State, ex rel., Standard Oil Co., v. Combs, Dir., 129 Ohio St., 251, 194 N. E., 875; City of Dayton v. S. S. Kresge Co., 114 Ohio St., 625, 151 N. E., 775, 53 A. L. R., 916; and City of Cleveland v. Terrill, 149 Ohio St., 532, 80 N. E. (2d), 115.

Myers v. City of Cincinnati, 128 Ohio St., 235, 190 N. E., 569, involved an ordinance which made it unlawful "to exhibit * * * any machine * * * which may be operated by the use of any coin, token * * * or disc * * * if said machine * * * when so operated * * * returns or distributes one or more coins, tokens * * * or discs." A machine which always returns one or always returns any other specific number of tokens would be described by the words of this ordinance. Such a machine obviously does not involve any element of chance, an essential element of gambling. Also, except for a possible inference which might be drawn from the portion of the opinion first quoted hereinafter, there is nothing in the report of the case to indicate that any element of chance was involved in playing this machine, i.e., a chance of getting *or not getting* tokens that would enable a replay.

In the opinion "by the court" it is said:

"Many recent decisions are to the effect that slot vending machines of the general type involved in this case, which in return for coins deposited therein dispense merchandise, accompanied at intervals by a varying number of checks or tokens which may be used either for obtaining additional merchandise or for securing additional amusement by continuing the operation of the machine, are gambling devices."

The report affirmatively indicates that the tokens received from this machine had no cash or trade value and that one who put a nickel in the machine always got a package of mints but that nothing but tokens came from the machine when replayed only with a token. Although tokens could be used "for securing additional amusement by continuing the operation of the machine," it does not appear whether the machine dispensed "at intervals * * * a varying number of tokens" or whether it simply dispensed on each occasion the same number of tokens. If the machine simply dispensed on each occasion the same number of tokens, then it would obviously not involve the element of chance, an essential element of gambling. See Westerhaus v. City of Cincinnati, supra (165 Ohio St., 327). That this may have been the fact is indicated by the remainder of the opinion reading, so far as pertinent:

"* * * our sole function is to decide whether the ordinance before us constitutes a valid exercise of police power on the part of the municipal authorities * * *.

"The constitutional provisions relied upon by plaintiff in error protect the citizen in his right to pursue any lawful business, but they do not prohibit legislation intended to control pursuits which because of their nature have injurious and harmful possibilities. Even if the slot machine involved in this case is manufactured and intended for lawful operation, its potentiality and design is such that it

may be easily put to unlawful use. (As by wagering on which or what combination of designs would appear on the stopping of each of the three wheels rotated in the playing of the machine.) The regulation or prohibition of such a mechanism need not be postponed until such event occurs * * *.

"* * *

"The city has the right to determine whether the exhibition, maintenance and operation of slot machines as defined in the ordinance are prejudicial to the public good * * *.

"Being of the opinion that the ordinance in question constitutes a valid exercise of police power and that the defendant was properly convicted under it, the judgment * * * is affirmed."

It is apparent that this court assumed in that case that the slot machine there involved was "manufactured and intended for lawful operation." However, this court unanimously held that a municipality might prohibit its exhibition because "its potentiality and design" were "such that it may be easily put to unlawful use"; and this court unanimously and specifically stated that "the * * * prohibition of such a mechanism need not be postponed until such event occurs." See also Zelles v. Matowitz, 139 Ohio St., 627, 41 N. E. (2d), 708 (trial court report in 22 Ohio Opinions, 261).

Such a conclusion is in full accord with decisions outside this state. Calcutt v. McGeachy, Sheriff (1937), 213 N. C., 1, 195 S. E., 49; Stanley v. State (1937), 194 Ark., 483, 107 S. W. (2d), 532; Woodward v. City of Lithonia (1940), 191 Ga., 234, 11 S. E. (2d), 476; Alexander v. Hunnicutt, Sheriff (1941), 196 S. C., 364, 13 S. E. (2d), 630; State, ex rel., Green, v. One 5¢ Fifth Inning Baseball Machine (1941), 241 Ala., 445, 3 So. (2d), 27. See Eccles v. Stone, Sheriff

(1938), 134 Fla., 113, 183 So., 628; Murphy v. People, 225 U. S., 621, 56 L. Ed., 1229, 32 S. Ct., 697, 41 L. R. A. (N. S.), 153; Ohio, ex rel., Clark, v. Deckebach, Aud., 274 U. S., 392, 71 L. Ed., 1115, 47 S. Ct., 630; 52 American Jurisprudence, 280, Section 34; 24 American Jurisprudence, 421, Section 34. Annotation, 148 A. L. R., 879, 895. But see also annotations, 132 A. L. R., 1004, 162 A. L. R., 1118.

If the reasoning of the court given in Stanley v. State, supra, as a basis for its decision were followed, we would be required to say in the instant cases that the machines described in the 1954 ordinance are "gambling devices per se because the only reasonable and profitable use to which they may be put is use in a game of chance." This is because a reading of the report of that case will readily lead to the conclusion that the machine there involved was much more of an amusement device than the machines described in the 1954 Columbus ordinance.

Although the allegations of plaintiffs' petitions disclose that their machines all register scores, it is conceivable that a pin game might be so designed as to register no score. However, it would not be a game within the ordinary meaning of the word "game", and hence would not be described by the words of the 1954 ordinance, if it did not enable someone to determine whether he had, by his efforts in playing it, either achieved or not achieved some objective. Hence, the pin game described in this ordinance will require payment of a price ("play * * * controlled by placing therein * * * coin") for the chance of achieving a score or some other objective. Even though no provision is made for the third essential element of gambling, i.e., a prize on achieving such score or other objective, it is apparent that the machine does furnish a ready means for two or more persons to gamble, by providing for such a prize on the achievement of some score or other objec-

tive of the game, and hence the game is readily adaptable to use for gambling purposes.

In determining whether the 1954 ordinance is reasonable and whether it has a substantial relationship to the health, morals, safety or general welfare of the people of Columbus, we must weigh the benefits to those people from the elimination of such devices against the benefits in having such devices available for use by those people and the interests of the plaintiffs as the owners of those devices. Cf. Curtiss v. City of Cleveland, 166 Ohio St., 509.

In doing so, we note at the outset that the ordinance does not purport to and could not make possession of the machines unlawful outside Columbus. Thus, plaintiffs can only be prevented from having them in Columbus. This may involve plaintiffs in some expense in moving the machines from Columbus and may prevent them from making money from their use in Columbus, but, if plaintiffs comply with the ordinance, they do not lose their machines and will have opportunities to make money from their use elsewhere.

It is true that these machines may be operated by members of the public without any gambling, but there will obviously be very little if any benefit from such operation to anyone, other than to the owner or exhibitor by reason of payments received for their use. Certainly, a legislative body could reasonably conclude that the amusement provided to operators of such machines, which is all they would get from their operation unless they were used as gambling devices, would contribute little if anything at all to the health, safety, morals or welfare of such operators or of the people of Columbus.

On the other hand, the potentialities for injury and harm to the health, morals, safety and welfare of the public from these machines may quite reasonably have been, as the

preamble to the 1954 ordinance indicates they were, regarded as very serious by the legislative body of Columbus.

In support of their contention that there are no such potentialities for such injury or harm, plaintiffs offered considerable evidence in an effort to establish that the games described by the 1954 ordinance do not tend to encourage gambling or loitering. With respect to a somewhat similar problem it was said in the opinion by Mr. Justice Lamar in Murphy v. People, supra (225 U. S., 623):

"That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything that could affect the morality of the community or of his patrons. The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness or other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation."

Where it has clearly appeared that legislation enacted pursuant to the police power is unreasonable or arbitrary or has no real or substantial relation to the public health, safety, morals, or general welfare, this court has not hesitated to hold it invalid. See Olds v. Klotz, 131 Ohio St., 447, 3 N. E. (2d), 371 (holding invalid ordinance limiting and fixing hours per day during which grocery might be kept open); City of Cincinnati v. Correll, 141 Ohio St., 535, 49 N.E. (2d), 412 (holding invalid ordinance limiting and fixing hours during which barber shop may remain open); Grieb v. Department of Liquor Control, 153 Ohio St., 77, 90 N. E. (2d), 691 (holding invalid statutes providing for confiscation of alcoholic liquors lawfully acquired and owned by but found on premises of one whose permit

to sell had been revoked or cancelled). However, as to the 1954 ordinance involved in the instant case, it does not so appear.

In contending that the 1954 ordinance is arbitrary and unreasonable, plaintiffs further point out that its words would preclude the possession of a pin-game machine in a private home, solely for the amusement of the owner, his family and friends; and it is contended that a municipal legislative body has no authority to enact any such prohibitory legislation.

As the preamble to the 1954 ordinance indicates, possession of the pin games described therein was made unlawful because the legislative body had, among other things, determined that their "operation * * * encourages gaming and the general disorder incidental thereto * * * and * * * encourages a false sense of values, idling and loitering." It is obvious that the operation of a machine in a private home would encourage the same things. Thus, Section 2915.06, Revised Code, makes it a crime for any "person" to "play a game for money or other thing of value or make a wager" therefor; and a pin game such as described in the 1954 ordinance could obviously be very readily used in a private home as a means of violating that statute.

Also, if the owner of a private home really wants to keep such a machine in his home solely for the amusement of himself, his family and friends, he can do so without violating the 1954 ordinance by acquiring such a machine so modified that its operation is not, to use the words of the ordinance, "controlled by placing therein any coin, plate, disk, plug, key or other token, or by the payment of a fee." It could hardly be contended with reason that the amusement to the operator, which plaintiffs claim is harmless, is such "placing therein" or "payment".

If the 1954 ordinance made an exception for possession of these machines in private homes, such exception would obviously furnish a means of covering up illegal possessions of such machines. Also such machines could then rapidly be moved to and from such homes in order to keep them away from the activity of law-enforcement officers.

In our opinion, the breadth of this prohibition of possession of these machines, as specified in the 1954 ordinance, has a reasonable basis and could reasonably have been determined by the Columbus legislative body to have a real and substantial relationship to the health, morals, safety and welfare of the people of Columbus.

It may further be observed with respect to this contention that, in making it, plaintiffs are seeking a decision that the 1954 ordinance is invalid, not because it impairs any constitutional rights of plaintiffs but because it impairs the constitutional rights of others. It has sometimes been said that "one attacking the constitutionality of a statute is not the champion of any rights except his own." 11 American Jurisprudence, 752, Section 111.

Plaintiffs contend, in effect, that, since they have many outstanding contracts with others for the operation of these pin games in Columbus, an ordinace making it a misdemeanor to possess or control such games within Columbus will be invalid because it will impair the obligation of those contracts within the meaning of constitutional provisions.

It is well settled that the provisions of the state and federal Constitutions, inhibiting laws impairing the obligation of contract, cannot affect the police power. In other words, the exercise of the police power cannot be headed off by the making of contracts reaching into the future. State, ex rel. Crabbe, Atty. Genl., v. Massillon Savings & Loan Co., 110 Ohio St., 320, 143 N. E., 894; City of Akron v. Public Utilities Commission, 149 Ohio St., 347, 78 N. E.

(2d), 890. Thus, if the police power of a municipality includes the power to make possession within the municipality of a certain kind of property unlawful, the exercise of that police power to make such possession unlawful will not be impaired by the fact that owners of such property have theretofore made otherwise binding contracts relative to its use within the municipality.

Plaintiffs contend in effect that, if possession of the games described in the 1954 ordinance is to be made unlawful because of the possibility that they might be used for gambling, then all games having a similar possibility should likewise be treated as unlawful; and that otherwise there will be a clear denial of the equal protection of the law within the meaning of constitutional provisions.

It is true that people do gamble with checkers and cards and gamble on the outcome of games such as golf, tennis, football and baseball. However, it would seem that there is a real and substantial distinction between pin games of the kind described in the 1954 ordinance and those other games, which would justify the classification of such pin games separately from those other games.

We believe that this contention of plaintiffs is disposed of by the following statements from the syllabus in City of Xenia v. Schmidt, 101 Ohio St., 437, 130 N. E., 24:

"5. A classification must not be arbitrary, artificial, or evasive, but there must be a real and substantial distinction in the nature of the class or classes upon which the law operates.

"6. In respect to such distinctions, the legislative body has a wide discretion, and the legislation involving classification will not therefore be held invalid unless the classification attempted is clearly and obviously unreasonable to

the point of discriminating against members of the same class, so as to deny them the equal protection of the laws.

"* * *

"8. The guarantee of 'equal protection of the laws' under our Constitutions is fully complied with when the law operates equally upon each member of a constitutional class.

"9. A legislative body may direct its legislation against any evil as it actually exists, without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are not forbidden. (Yee Bow v. City of Cleveland et al., 99 Ohio St., 269, approved and followed.)"

Plaintiffs contend that the 1954 ordinance forbids what the statutes permit and therefore represents a regulation which is "in conflict with general laws" within the meaning of Section 3 of Article XVIII of the Constitution.

In support of this contention, it is pointed out that there is no statute or constitutional provision which forbids the operation of an amusement device of the kind described in the 1954 ordinance. Apparently, to the extent that they fail to prohibit the possession or control of machines such as described in the 1954 ordinance, the statutes of Ohio may be said to permit such possession or control. However, there is no statute or constitutional provision which authorizes the possession or control of such machines.

In disposing of a similar contention with respect to a Columbus ordinance which made it a crime to have "possession * * * custody, or * * * control" of "any ticket, check * * * slip * * * or document * * * used * * * as evidence * * * in * * * recording * * * an interest in a lottery," it was said in the opinion by Middleton, J., in City of Columbus v. Barr, 160 Ohio St., 209, 212, 115 N. E. (2d), 391:

"The ordinance merely goes further than the statute in prescribing a penalty for engaging in gambling transactions not covered by the statute. The ordinance is not inconsistent with the statute."

See also Village of Struthers v. Sokol, 108 Ohio St., 263, 140 N. E., 519, and Dallmann v. Kluckesky, 229 Wis., 169, 282 N. W., 9.

Arguments have been made with respect to the validity and interpretation of other provisions of the three Columbus ordinances involved in the instant cases. However, in view of our conclusion that the allegations of plaintiffs' petitions and the provisions of the 1954 ordinance require dismissal of plaintiffs' petitions, anything that we might say with respect to other provisions of those three ordinances or their validity would represent the consideration of something not necessary to sustain the judgments being rendered and hence might be considered as dicta.

Judgments affirmed.

Weygandt, C. J., Zimmerman, Bell and Matthias, JJ., concur.

Stewart, J., concurs in the judgment.

Herbert, J., dissents.

APPENDIX E

Judgment Entry of the Supreme Court of Ohio in the Benjamin Case

(Dated December 18, 1957)

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin county and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the court that there were

reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellees recover from the appellants their costs herein expended taxed at $.....

Ordered that a special mandate be sent to the Court of Appeals of Franklin county, to carry this judgment into execution.

Judgment Entry of the Supreme Court of Ohio in the Ferguson Case

(Dated December 18, 1957)

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin county and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellees recover from the appellants their costs herein expended taxed at $.....

Ordered that a special mandate be sent to the Court of Appeals of Franklin county, to carry this judgment into execution.

APPENDIX F

An Ordinance No. 156-53

To amend the Code of the city of Columbus, Ohio, 1952, Chapter 35, Public Amusements, Article III, Mechanical Amusement Devices, Division 1, Generally, Section 35.28, Definitions, Section 35.30, Seizure and Destruction of Gambling Devices, Division 2, Licenses and Registration, Section 35.33, Not To Be Issued for Gambling Devices, and to repeal said original sections.

Be it ordained by the council of the city of Columbus:

Section 1. That the Code of the city of Columbus, Ohio, 1952, Chapter 35, Public Amusements, Article III, Mechanical Amusement Devices, Division 1, Generally, Section 35.28, Definitions, be and the same is hereby amended to read as follows:

Section 35.28—Definitions.

1. Amusement arcade. An amusement arcade is defined as a place of amusement which derives in excess of seventy per cent of its gross receipts from the operation of mechanical or electrically operated amusement devices as defined in paragraph 3 of this section; provided, however, that in the case of any person operating a carnival and who operates an amusement arcade as a part thereof, the seventy per cent gross receipts referred to above shall apply only to the gross receipts of the amusement arcade and not to gross receipts of the operations of the carnival company.

2. Exhibitor. An exhibitor is defined as any person owning and exhibiting or contracting or permitting any mechanical amusement device, as defined in paragraph 3 of this section, to be installed, used and exhibited in his own place of business irrespective of the ownership of such device.

3. Mechanical amusement device. A mechanical or electrically operated amusement device is hereby defined as a machine, device or instrument which, upon the insertion of a coin, token or slug, operates, or may be operated for use as a game, contest of skill or amusement of any description, and which in no way tends to encourage gambling and which in no way is violative of the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, Sections 29.38, 29.38-1, 29.40, 29.42, 29.42-1 and 29.42-2 as the same are now enacted or as such sections may hereafter be amended. This definition is not intended to and does not include merchandise vending machines.

4. Owner. The owner is any person having title to any such mechanical amusement device, or amusement arcade as hereinabove defined. (Ord. No. 345-48.)

Sec. 2. That the Code of the city of Columbus, Ohio, 1952, Chapter 35, Article III, Mechanical Amusement Devices, Division 1, Generally, Section 35.30, Seizure and Destruction of Gambling Devices, be and the same is hereby amended to read as follows:

Section 35.30—Types of amusement devices that shall be seized, demolished and destroyed.

Any machine, device, instrument, apparatus or contrivance which tends to encourage gambling and may be used in a manner violative of the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, Sections 29.38, 29.38-1, 29.40, 29.42, 29.42-1 and 29.42-2, shall be seized, destroyed or demolished pursuant to the provisions of Sections 29.39, Gambling—Seizure and Destruction of Devices, Chapter 29, Offenses—Miscellaneous, of the Code of the city of Columbus, Ohio, 1952.

Sec. 3. That the Code of the city of Columbus, Ohio, 1952, Chapter 35, Public Amusements, Article III, Mechani-

cal Amusement Devices, Division 2, License and Registration, Section 35.33, Not To Be Issued For Gambling Devices per se, etc., be and the same is hereby amended to read as follows:

Section 35.33—Not to be issued for gambling devices.

The City Auditor shall not issue a license or a registration to any exhibitor, person or entity for any machine, device or instrument which tends on any way to encourage gambling which in any manner is violative of the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, Sections 29.38, 29.38-1, 29.40, 29.42, 29.42-1 and 29.42-2 as the same are now amended or as such sections may hereafter be amended.

Sec. 4. That original Section 35.28 and original Section 35.30, Division 1, Generally, and original Section 35.33, Division 2, all in Article III, Chapter 35 of the Code of the city of Columbus, Ohio, 1952, be and the same are hereby repealed.

Sec. 5. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed March 9, 1953.

Joseph R. Jones,
President of Council.

Approved March 10, 1953.

R. T. Oestreicher, Mayor.

Attest:

Agnes Brown Cain, City Clerk.

APPENDIX G

An Ordinance No. 157-53

To amend the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, Section 29.38, Gambling—Permitting Prohibited, Section 29.39, Gambling—Seizure and Destruction of Gambling Devices, Section 29.42, Gambling—Slot Machines, Pinball Machines, etc., and repeal said original sections; and to amend the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, by enacting new Section 29.38-1, Gambling — Permitting Prohibited, new Section 29.42-1, Gambling Devices Prohibited, etc., and new Section 29.42-2, Coin Machines Prohibited.

Be it ordained by the council of the city of Columbus:

Section 1. That the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, Section 29.38 be and the same is hereby amended to read as follows:

Section 29.38—Devices encouraging or adaptable to gambling; seizure.

It is hereby declared prejudicial to the public good, detrimental to the public morals and a nuisance, for any person to exhibit for the purpose of operating or to permit the operation of any machine, device or instrument in the city of Columbus, Ohio, of whatever kind or description, or by whatever name known or commonly referred to which tends to encourage gambling, or which registers odds or a score, or which is adapted, or may readily be converted into such machine, device or instrument that is adapted, for use in a manner violative of Sections 29.38-1, 29.40, 29.42, 29.42-1 and 29.42-2 of this chapter, and every machine so exhibited or permitted to be operated shall be subject to seizure, by any police officer of the city, and no such machine, device

or instrument so seized by any police officer of the city, whether under the authority of this section or Section 29.39 or otherwise, shall be returned to the owner or person claiming the same except pursuant to an order of a court of competent jurisdiction.

Sec. 2. That the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, be and the same is hereby amended by the enactment and codification of new Section 29.38-1, Gambling—Permitting Prohibited, which shall read as follows:

Section 29.38-1—Gambling—permitting prohibited.

Whoever in the city permits any game whatsoever to be played for gain upon or by means of any machine, device or instrument, of whatever denomination or name, upon the premises of which he has the care or possession shall be fined not less than $50.00, nor more than $200.00, or imprisoned not more than six (6) months, or both.

Sec. 3. That the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, Section 29.39, Gambling—Destruction of Devices, be and the same is hereby amended to read as follows:

Section 29.39—Gambling—seizure and destruction of devices.

The Mayor, the Director of Public Safety, or any police officer shall seize, direct or cause to be seized any machine, device or instrument used for the purpose of gambling, or on, by, or with which money or any other thing or article of value may be won or lost, and all such machines, devices or instruments shall be demolished or destroyed under the direction of the Mayor or the Director of Public Safety, upon it being adjudged by the courts that such machines, devices or instruments were used, kept or intended for the purpose of gambling.

Sec. 4. That the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, Section 29.42, Gambling—Slot Machines, Pinball Machines, etc., be and the same is hereby amended to read as follows:

Section 29.42—Gambling machines, devices or instruments, etc.

Any person who shall within the city manufacture, assemble, repair or knowingly store, display or have in his possession for any commercial use, financial gain, or compensation, any coin or token operated gambling device, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500.00, and for a second or subsequent offense shall upon conviction be fined not exceeding $1,000.00, or to be imprisoned not to exceed eleven (11) months, or both. For the purpose of this section, "gambling device" shall mean and include any device having an automatic payoff or automatic free play mechanism or any device easily convertible to automatic payoff or free play by slight changes in, or addition to the mechanical structure, or any coin or token operated device actually used for gambling purposes, any of which in the operation of such device the player stands a chance to gain an award or property of greater value than the consideration paid.

Sec. 5. That the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, be and the same is hereby amended by the enactment and codification of new Section 29.42-1, Gambling Devices Prohibited, etc., which shall read as follows:

Section 29.42-1—Gambling devices prohibited.

Whoever keeps or exhibits for gain a coin-in-slot machine or device, where the merchandise, property or checks obtained by playing or operating such machine or device is not for each operation thereof substantially equal in value

or where the number of units of property or checks is not, for each operation, equal in number and value, shall be fined not less than $50.00 nor more than $500.00.

Sec. 6. That the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, be and the same is hereby amended by the enactment and codification of new Section 29.42-2 Gambling—Coin Machines Prohibited, which shall read as follows:

Section 29.42-2.—Gambling—coin machines prohibited.

Whoever exhibits, operates or permits the operation of any machine, device or instrument whether or not it purports to vend or distribute merchandise or to furnish recreation or amusement, which is caused to operate by the insertion of any token, slug or disc, or exhibits or operates or permits the operation of any machine, device or instrument which is caused to operate by the insertion of any coin whether such device, machine or instrument purports to vend or distribute merchandise or to furnish recreation or amusement, which as a result of such operation discharges one or more coins, tokens, slugs or discs or other memorandum, or which registers odds or a score of the result of operation which makes it possible for one user to receive more value than another user inserting a similar coin shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than $50.00, nor more than $500.00, or shall be imprisoned for not more than six (6) months, or both, and shall stand committed until such fine be paid or sentence served or until otherwise discharged by due process of law. Each day's violation shall constitute a separate offense.

Sec. 7. That original Section 29.38, original Section 29.39 and original Section 29.42 of Chapter 29, Offenses—Miscellaneous, of the Code of the city of Columbus, Ohio, 1952, be and the same are hereby repealed.

Sec. 8. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed March 9, 1953.

Joseph R. Jones,
President of Council.

Approved March 10, 1953.

R. T. Oestreicher, Mayor.

Attest:

Agnes Brown Cain, City Clerk.

APPENDIX H

An Ordinance No. 1615-54

To prohibit the possession of pin-ball and certain other similar machines; to supplement the Code of the City of Columbus, 1952, by the enactment of Section 29.69-1 thereof; and to declare an emergency.

Whereas, the operation of pin ball machines and similar machines involving chance or skill or reward encourages gaming and the general disorder incident thereto, and is a threat or menace to the peace and morals of the community; and,

Whereas, even the so-called amusement-only pin-ball machines are so constructed as to be almost identical in appearance and operation to certain gambling devices, per se; and,

Whereas, even the vast majority of such so-called amusement-only devices are readily convertible to gambling devices; and,

Whereas, the operation of even amusement-only pin-ball machines has become and now constitutes a nuisance in that it encourges a false sense of values, idling, and loitering; and,

Whereas, an emergency exists in that such pin-ball machines are now generally absent from the city, but will return unless immediately prohibited; and for the immediate preservation of the public peace and safety; now, therefore,

Be it ordained by the council of the city of Columbus:

Section 1. That the Code of the City of Columbus, 1952, be and the same is hereby supplemented by the enactment of new Section 29.69-1 thereof, which said section shall read as follows:

"Section 29.69-1. Pinball Machines, Prohibited. Whoever shall within the city have in his possession, or in his custody or under his control any table game or device commonly known as a 'pin-game,' 'pin-ball game,' or 'marble game,' the operation, use or play of which is controlled by placing therein any coin, plate, disk, plug, key or other token, or by the payment of a fee, shall be guilty of a misdemeanor and upon conviction shall be filed not more than five hundred dollars, or imprisonment not more than six months, or both."

Sec. 2. That for the reasons stated in the preamble hereto, this ordinance is hereby declared to be an emergency measure and shall take effect and be in force from and after its passage and approval by the mayor.

Passed December 6, 1954.

O. J. Fillinger,

President of Council.

Approved December 7, 1954.

M. E. Sensenbrenner, Mayor.

Attest:

Agnes Brown Cain, City Clerk.